TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 313

BOOTH FISHERIES COMPANY AND ZURICH GENERAL ACCIDENT & LIABILITY COMPANY, LTD., PLAINTIFFS IN ERROR,

vs.

INDUSTRIAL COMMISSION OF THE STATE OF WISCONSIN AND MARY McLAUGHLIN

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

FILED MARCH 14, 1925

Inside

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[fol. 1] **IN SUPREME COURT OF WISCONSIN**

No. 167

BOOTH FISHERIES COMPANY, a Corporation, and ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LTD., Appellants,

vs.

INDUSTRIAL COMMISSION OF WISCONSIN and MARY MCLAUGHLIN, Respondents

PETITION FOR WRIT OF ERROR—Filed Jan. 23, 1925

To the Honorable Chief Justice of the Supreme Court of the State of Wisconsin:

Your petitioners, Booth Fisheries Company, a corporation, and Zurich General Accident & Liability Insurance Company, Ltd., hereby respectfully sets forth and show that on the 11th day of November, A. D. 1924, the Supreme Court of the State of Wisconsin, sitting at Madison, Wisconsin, made and entered a final order and judgment in the above entitled case in favor of the respondents, and against your petitioners, in which final order and judgment, and the proceedings had in this cause, certain errors were committed to the prejudice of your petitioners, Booth Fisheries Company, a corporation, and Zurich General Accident & Liability Insurance Company, Ltd., all of which appear in detail from the Assignment of Errors filed in this cause with this petition; and

That the Supreme Court of the State of Wisconsin is the highest court of said State of Wisconsin, in which a decision in this suit and [fol. 2] matter could be had; and,

That this suit or cause is one in which Mary McLaughlin, the surviving widow of William McLaughlin, was on the 20th day of January, A. D. 1923, awarded compensation against your petitioner in the sum of Four thousand three hundred ($4,300.00) dollars, for the death of William McLaughlin, deceased, who, on October 6, 1922, while in the employ of the appellant, Booth Fisheries Company, a corporation, was performing services, growing out of and incidental to his employment, and sustained personal injuries, which resulted in his death on October 19, 1922. Thereafter an appeal was prayed to the Circuit Court of the County of Dane of the State of Wisconsin by the petitioners on the ground that the finding of the Industrial Commission was not supported by the evidence. On hearing before the Circuit Court of the County of Dane of the State of Wisconsin it was contended that the Workmen's Compensation Act of the State of Wisconsin, Section 102.23, deprived the petitioners of due process of law, because it does not provide for a judicial review of the facts, and in support of the position taken by the petitioner the case of Ohio Valley Water Company v. Ben Avon Borough, 253 U. S. 287, was relied upon. The Circuit Court held that

this question was no longer an open one in that court, and affirmed the decision of the Industrial Commission. The petitioners thereupon prayed an appeal to the Supreme Court of Wisconsin and challenged the constitutionality of Section 102.23 of the Wisconsin Statute, which reads as follows:

"The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive; and the order or award, either interlocutory or final, whether judgment has been rendered thereon or not, shall be subject to review only in the manner and upon the grounds following: Within thirty days from the date of the order or award, any party aggrieved thereby may commence, in the circuit court for Dane County, an action against the commission for the review of such order or award, in which [fol. 3] action the adverse party shall also be made defendant. In such action a complaint, which shall state the grounds upon which a review is sought, shall be served with the summons. Service upon the secretary of the commission, or any member of the commission, shall be deemed completed service. The commission shall serve its answer within twenty days after the service of the complaint, and, within the like time, such adverse party shall, if he so desires, serve his answer to said complaint. With its answer, the commission shall make return to said court of all documents and papers on file in the matter, and of all testimony which may have been taken therein, and of its order, findings and award. Such return of the commission when filed in the office of the clerk of the circuit court shall, with the papers mentioned in section 2898 of the statutes, constitute a judgment roll in such action; and it shall not be necessary to settle a bill of exceptions in order to make such return part of the record of such court in such action. Said action may thereupon be brought on for hearing before said Court upon such record by either party on ten days' notice to the other; subject, however, to the provisions of law for a change of the place of trial or the calling in of another judge. Upon such hearing, the court may confirm or set aside such order or award, and any judgment which may theretofore have been rendered thereon; but the same shall be set aside only upon the following grounds:

(a) That the commission acted without or in excess of its powers.

(b) That the order or award was procured by fraud.

(c) That the findings of fact by the commission do not support the order or award.

(d) Upon the trial of any such action the court shall disregard any irregularity or error of the commission unless it be made to affirmatively appear that the plaintiff was damaged thereby.

(e) The record in any case shall be transmitted to the commission within twenty days after the order or judgment of the court, unless appeal shall be taken from such order or judgment.

(f) Whenever an award is made against the state the attorney-general may bring an action for review thereof in the same grounds as are provided by subsection (1) hereof."

It being contended that the provision for a judicial review as considered by the Supreme Court of Wisconsin did not amount to due process of law, because it failed to provide for an independent judicial determination of the facts, as well as the law as laid down by the Supreme Court of the United States in Ohio Valley Water Com-
[fol. 4] pany v. Ben Avon Borough, 253 U. S. 287, and that therefore that Section of the Wisconsin Statutes was in conflict with the due process clause of the Fourteenth Amendment.

A final judgment rendered in the above entitled cause refuses your petitioner the relief sought and affirms the judgment of the Circuit Court of Dane County.

This judgment, your petitioner shows, was erroneous by and upon the grounds stated in the assignment of errors filed herewith.

Wherefore, your petitioners, the Booth Fisheries Company, a corporation, and the Zurich General Accident & Liability Insurance Company, Ltd., prays that a Writ of Error to the Supreme Court of the United States may issue, and for an order fixing the amount of a supersedeas bond, and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the Supreme Court of the United States.

Booth Fisheries Company and Zurich General Accident & Liability Company, Ltd., by Henry J. Berdinger, Attorney for Petitioners. George A. Schneider, of Counsel.

[fol. 5] [File endorsement omitted.]

[fol. 6] IN SUPREME COURT OF WISCONSIN

WRIT OF ERROR AND RETURN—Filed Jan. 23, 1925

UNITED STATES OF AMERICA, ss:

The President of the United States of America, to the Honorable the Chief Justice of the Supreme Court of the State of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Booth Fisheries Company, a corporation, and Zurich General Accident & Liability Insurance Company, Ltd., and Industrial Commission of Wisconsin and Mary McLaughlin wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution,

treaties, or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened, to the great damage of the said Booth Fisheries Company, a corporation, and Zurich General Accident & Liability Company, Ltd., as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and pro- [fol. 7] ceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the twenty-third day of January, in the year of Our Lord one thousand nine hundred and twenty-five.

H. C. Hale, Clerk of the District Court United States, Western District of Wisconsin, by Fred W. French, Deputy Clerk. (Seal of the U. S. District Court, Western District of Wisconsin. Madison.)

The return to the within writ appears by the schedule hereto annexed.

The return of the Justices of the Supreme Court of the State of Wisconsin.

Arthur A. McLeod, Clerk of Supreme Court, Wisconsin. (Seal of the Supreme Court of Wisconsin.)

[fol. 8] [File endorsement omitted.]

[fol. 9] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER ALLOWING WRIT OF ERROR—Filed Jan. 23, 1925

This 23rd day of January, A. D., 1925, came the plaintiff in error by their attorneys and filed herein and presented to the Court their petition praying also that a transcript of the record, proceedings and papers upon which the form herein was rendered duly authenticated may be sent to the Supreme Court of the United States and that other and further proceedings may be had as may be proper in the premises.

In consideration where- the Court does allow a Writ of Error upon the plaintiff giving bond according to law in the sum of Six Thou-

sand Dollars ($6,000.00), which bond shall stay execution upon the form herein.

A. J. Vinje, Chief Justice Supreme Court of the State of Wisconsin. (Seal of the U. S. District Court, Western District of Wisconsin. Madison.)

Approved. H. C. Hale, Clerk U. S. District Court, Western Dist. of Wisconsin.

[fol. 10] [File endorsement omitted.]

[fol. 11] Citation—In usual form, showing service on Herman L. Ekern et al.; filed Jan. 23, 1925; omitted in printing

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[fols. 12-16] [Endorsed:] Original. State of Wisconsin. In Supreme Court. Booth Fisheries Company, a corporation, et al., appellants, vs. Industrial Commission of Wisconsin and Mary McLaughlin, respondents. Citation. Writ of error. Henry J. Bendinger, 728 1st Wis. Nat. Bank Bldg., Milwaukee, Wisconsin, Attorney for the Appellants. George A. Schneider, of counsel. Filed Jan. 30, 1925. Arthur A. McLeod, Clerk of Supreme Court, Wis.

[fols. 17 & 18] In Supreme Court of Wisconsin

[Title omitted]

Certificate of Lodgment

I, Arthur A. McLeod, clerk of the said court, do hereby certify that there was lodged with me as such clerk on the 23rd day of January, A. D. 1925, in the above entitled matter the following:

1. The original bond of which a copy is herein set forth.

2. Four copies of the writ of error, as herein set forth, one for each defendant, and one to file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office, in the City of Madison, in the State of Wisconsin, this 23rd day of January, A. D. 1925.

Arthur A. McLeod, Clerk Supreme Court of Wisconsin
(Seal of the Supreme Court of Wisconsin.)

[fols. 19-22] Bond on Writ of Error of Booth Fisheries for $6,000—Approved and filed Jan. 23, 1925; omitted in printing

[fols. 23-27] Bond on Writ of Error of Zurich General Accident & Liability Insurance Co. for $6,000—Approved and filed Jan. 23, 1925; omitted in printing

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[fol. 28] In Supreme Court of Wisconsin

[Title omitted]

Assignment of Errors—Filed Jan. 23, 1925

Now comes the above Booth Fisheries Company, a corporation, and files herewith its petition for a writ of error and says that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following assignment:

The Supreme Court of Wisconsin erred in holding and deciding that Section 102.23 of the Wisconsin Statutes was valid. The validity of said Section was denied and drawn in question by the Booth Fisheries Company, a corporation, on the ground of their being repugnant to the Constitution of the United States, and in contravention thereof.

The said errors are more particularly set forth as follows:

The Supreme Court of Wisconsin erred in holding and deciding:

First. That Section 102.23 of the Wisconsin Statutes, which said Section reads as follows:

[fol. 29] "The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive; and the order or award, either interlocutory or final, whether judgment has been rendered thereon or not, shall be subject to review only in the manner and upon the grounds following: Within thirty days from the date of the order or award, any party aggrieved thereby may commence, in the circuit court for Dane County, an action against the commission for the review of such order or award, in which action the adverse party shall also be made defendant. In such action a complaint, which shall state the grounds upon which a review is sought, shall be served with the summons. Service upon the secretary of the commission, or any member of the commission, shall be deemed completed service. The commission shall serve its answer within twenty days after the service of the complaint, and, within the like time, such adverse party shall, if he so desires, serve his answer to said complaint. With its answer, the commission shall make return to said court of all documents and papers on file in the matter, and of all testimony which may have been taken therein, and of its order, findings and award, such return of the commission when filed in the office of the clerk of the circuit court shall, with the papers mentioned in section 2898 of the statutes, constitute a judgment roll in such action; and it shall not be necessary to settle a bill of excep-

tions in order to make such return part of the record of such court in such action. Said action may thereupon be brought on for hearing before said court upon such record by either party on ten days' notice to the other; subject, however, to the provisions of law for a change of the place of trial or the calling in of another judge. Upon such hearing, the court may confirm or set aside such order or award; and any judgment which may theretofore have been rendered thereon; but the same shall be set aside only upon the following grounds:

(a) That the commission acted without or in excess of its powers.

(b) That the order or award was procured by fraud.

(c) That the findings of fact by the commission do not support the order or award.

(2) Upon the trial of any such action the court shall disregard any irregularity or error of the commission unless it be made to affirmatively appear that the plaintiff was damaged thereby.

(3) The record in any case shall be transmitted to the commission within twenty days after the order or judgment of the court, unless appeal shall be taken from such order or judgment.

(4) Whenever an award is made against the state the attorney-general may bring an action for review thereof in the same manner and upon the same grounds as are provided by subsection (1) hereof."

Did not abridge the privileges and immunities of citizens or of Booth Fisheries Company, a corporation, as guaranteed by the Fourteenth Amendment of the Federal Constitution.

[fol. 30] For which errors said Booth Fisheries Company, a corporation, prays that the said judgment of the Supreme Court of the State of Wisconsin dated November 11, A. D. 1924, be reversed and a judgment rendered in favor of the Booth Fisheries Company, a corporation, and for costs.

Henry J. Bendinger, George A. Schneider (of Counsel), Attorneys for Booth Fisheries Company, a Corporation, and Zurich General Accident & Liability Company, Ltd.

[fol. 31] [File endorsement omitted.]

[fol. 32] [Caption omitted]

[fol. 33] [File endorsement omitted]

In Circuit Court of Dane County

State of Wisconsin:

Booth Fisheries Company and Zurich General Accident & Liability Insurance Corporation, Limited, Plaintiffs,

vs.

Industrial Commission of Wisconsin and Mary McLaughlin, Defendants

Notice of Appeal—Filed in Circuit Court of Dane County Feb. 13, 1924; in Supreme Court March 8, 1924

Please take notice that the Zurich General Accident & Liability Insurance Corporation, Limited, and the Booth Fisheries Company, the above named plaintiffs in this action, hereby appeal to the Supreme Court of the State of Wisconsin, from the judgment rendered and entered in this action in the Circuit Court for the County of Dane, on the 28th day of December, A. D. 1923, wherein it was adjudged that the order of the Industrial Commission of Wisconsin, dated January 20th, 1923, awarding to the defendant Mary McLaughlin, against the plaintiffs Zurich General Accident & Liability Insurance Corporation, Limited, and the Booth Fisheries Company, certain sums as death benefits because of the death of William McLaughlin, be in all respects confirmed, and from the whole of said judgment.

Dated this 2nd day of February, 1924.

Freeman & Bendinger, Plaintiff's Attorneys, 728 1st Wis. Nat. Bk. Bldg., Milwaukee, Wis. George A. Schneider, of Counsel.

To Hon. Herman L. Ekern, Attorney General; Frank A. Ross, Esq., Attorneys for Defendant Industrial Commission of Wisconsin; Kittell, Jaseph & Young, Attorneys for Mary McLaughlin; H. F. Hansen, Clerk of the Circuit Court, Dane County, Wisconsin.

[fol. 34] Due and legal service of the within Notice of Appeal, is hereby admitted this 4th day of February, A. D. 1924.

—— ——, Attorneys for Defendant Industrial Commission of Wisconsin.

Due and legal service of the within Notice of Appeal is hereby admitted this 4th day of February, A. D. 1924.

Kittell, Jaseph, Young & Everson, Attorneys for Defendant Mary McLaughlin.

Due and legal service of the within Notice of Appeal is hereby admitted this 13 day of February, A. D. 1924.

Herbert F. Hansen, Clerk of the Circuit Court, Dane County, Wisconsin.

[fols. 35 & 36] [File endorsement omitted.]

[fol. 37] [File endorsement omitted]

IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

BILL OF COMPLAINT—Filed in Circuit Court Feb. 10, 1923; in Supreme Court March 8, 1924

The above named plaintiffs, by their attorneys, Freeman & Bendinger, for complaint herein allege:

1. That the plaintiffs now are and at all times mentioned herein were corporations duly authorized to do business under the laws of the State of Wisconsin.

2. That on the 6th day of October, 1922, the above named plaintiffs were subject to the provisions of Section 2394-3 to 2394-32, inclusive, of the Wisconsin Statutes; and that on said date the plaintiff, Booth Fisheries Company, had in its employ one William McLaughlin, and that on said date the said William McLaughlin was also subject to the provisions of the Wisconsin Statutes as herein referred to.

3. That on or about the 4th day of November, 1922, the defendant Mary McLaughlin filed with the defendant Industrial Commission of Wisconsin, her application for compensation and death benefit under the provisions of Section 2394-3 to 2394-32, inclusive of the Wisconsin Statutes and the plaintiffs duly made and filed their answer thereto.

[fol. 38] 4. That on the issue thus joined a hearing was duly had before the Industrial Commission of Wisconsin.

5. That on or about the 20th day of January, 1923, the defendant Industrial Commission of Wisconsin made and filed its findings of fact and award in said matter; that these defendants bring this action to review said findings and award upon the ground that the said defendant Industrial Commission of Wisconsin, acted without and in excess of its powers in this, that said award is based upon the finding made by said Industrial Commission of Wisconsin, which reads as follows:

"That on October 6, 1922, while in the employ of the respondent, performing service growing out of and incidental to his employment, the said William McLaughlin sustained personal injuries which resulted in his death on October 19th, 1922; that the death of the said William McLaughlin was proximately caused by accident and was not intentionally self-inflicted; that the applicant was the widow of William McLaughlin, and was living with him as his wife on the date of his death."

6. That the said findings, insofar as they state that the said William McLaughlin on October 6th, 1922, while in the employ of the respondent performing services growing out of and incidental to his employment sustained personal injuries which resulted in his death on October 19, 1922, and that the death of the said William McLaughlin was proximately caused by accident and that the applicant was the widow of William McLaughlin and was living with him as his wife on the date of his death, is wholly unsupported by the evidence in the case and is contrary to the evidence and contrary to the law and in making said finding and in making its award based upon said finding, the defendant Industrial Commission of Wisconsin acted without and in excess of its powers.

[fols. 39 & 40] 7. Plaintiffs further allege that the findings of fact as herein set forth and found by the Industrial Commission of Wisconsin do not support the award.

Wherefore these plaintiffs pray the court to review the findings and award of the Industrial Commission of Wisconsin set forth above and to grant judgment on said review setting aside said award and for such other and different relief as the court may deem just and proper under the circumstances.

Freeman & Bendinger, Attorneys for Booth Fisheries Company and Zurich General Accident & Liability Corp., Ltd., Plaintiffs.

[fol. 41] [File endorsement omitted]

IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

ANSWER—Filed in Circuit Court Feb. 27, 1923; in Supreme Court March 8, 1924

The above named defendant, Industrial Commission of Wisconsin, by Herman L. Ekern, Attorney General, and Winfield W. Gilman, Assistant Attorney General, its attorneys, for its separate answer to the complaint herein, respectfully shows:

This defendant denies that it acted without or in excess of its powers in making its findings, order and award referred to in said complainant in any particular or particulars alleged in said com-

plaint; denies that it acted without or in excess of its powers in making its finding that William McLaughlin, on October 6, 1922, while in the employ of the Booth Fisheries Company, performing services growing out of and incidental to his employment, sustained personal injuries which resulted in his death on October 19, 1922 and denies that such finding is not supported by the evidence; denies it acted without or in excess of its powers in making its finding that the death of the said William McLaughlin was proximately caused by accident, and denies that such finding is not supported by the [fols. 42-46] evidence; denies that it acted without or in excess of its powers in making its finding that the said Mary McLaughlin was the widow of William McLaughlin and was living with him as his wife on the date of his death and denies that such finding is not supported by the evidence.

This defendant denies that the findings of fact made by it do not support the award.

Wherefore, this defendant demands judgment that the findings, order and award complained of be confirmed.

Herman L. Ekern, Attorney General; Winfield W. Gilman, Assistant Attorney General, Attorneys for Defendant Industrial Commission of Wisconsin.

[fols. 47-57] Industrial Commission of Wisconsin

Application for Adjustment of Claim

Workmen's Compensation Act, Chapter 624, Laws of 1917

Mrs. Mary McLaughlin, Applicant,

vs.

Booth Fish. Co., Employer; —— —— (Name will be furnished by Industrial Commission on request), Insurance Carrier, Respondents

The petition of the above named applicant respectfully shows:

1. Address of Applicant: 815 Bond St. Green Bay, Wisconsin.

2. Address of Employer: Green Bay, Wisconsin.

3. Accident occurred at (City or Town) Green Bay on the 7th day of October 1922, and was caused as follows: Deceased went into freezer to attend to salamander and became sick from gas fumes.

4. Nature of injury: Gas poisoning.

5. Injured was earning when injured $3.00 per day; $21 per week; $1,092.00 per year.

6. Injured was 76 years of age when injured.

7. Disability for which compensation is claimed: Death; occurred on Oct. 19th, 1922. (State how long disabled and whether there is any permanent disability. If the injury resulted in death give the date of death)

8. Notice of injury was given employer on (Date) October 9, 1922 in the following manner: Mrs. McLaughlin called company on phone, giving particulars of sickness.

9. Doctor- who treated injured: (Name) Dr. Knox, Dr. Buchanon, (Address) Green Bay, Dr. Barton Green Bay.

10. Expense injured incurred for doctor: $15.50; for hospital and medicines, $ Not known (4 days in ward room hospital).

11. Compensation paid injured: $ None.

12. Name of deceased: (If claim is for death benefit) William H. McLaughlin; relation of deceased to applicant: Husband. Applicant was dependent upon deceased at date of accident? (Yes or No) Yes. Applicant lived with deceased at time of death? (Yes or No) Yes.

13. Other material facts: The applicant is a woman seventy one years of age, has no children and is absolutely without funds.

Wherefore the applicant prays that the said respondent be required to answer the charges herein and that an order or award be made by the Industrial Commission granting such relief as the applicant may be entitled to in the premises.

Dated at Green Bay, Wisconsin, this 4th day of Nov. 1922.

(Applicant must sign here:) (Signed) Mrs. Mary McLaughlin.

NOTE—Either party to the dispute may apply to the commission for an adjustment of any matter in dispute.

The original application and two copies for the respondent must be mailed to the Industrial Commission, Madison, Wis.

[fol. 58] BEFORE THE INDUSTRIAL COMMISSION OF WISCONSIN

MARY MCLAUGHLIN, Applicant,

vs.

BOOTH FISHERIES COMPANY, Respondent; ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE CORPORATION, LIMITED, Insurance Carrier.

Pursuant to notice duly given, hearing was held at Green Bay, Wisconsin, on January 12, 1923.

Appearances: Applicant appeared in person and by her attorneys, Kittell, Jaseph & Young; respondents by W. W. Savage.

Upon the evidence submitted, the commission makes the following

Findings of Fact

On October 6th, 1922, Wm. McLaughlin and the respondent were subject to the provisions of Sections 2394-3 to 2394-32, inclusive, of the Wisconsin Statutes; that on October 6, 1922, the said William McLaughlin was in the employ of the respondent at an average annual wage of $1,050.00; that on October 6, 1922, while in the employ of the respondent, performing service growing out of and incidental to his employment, the said William McLaughlin sustained personal injuries, which resulted in his death on October 19th, 1922; that the death of the said William McLaughlin was proximately caused by accident and was not intentionally self inflicted; that the applicant was the widow of William McLaughlin, and was living with him as his wife on the date of his death; that the applicant is entitled to a death benefit of $4,200.00.

Now, therefore, the Industrial Commission awards that the respondent shall within ten days from this date, pay not to exceed $100.00 towards the expense of burial of the deceased; that the re-
[fols. 59-83] spondent shall pay to the applicant a death benefit of Forty Two Hundred and no One Hundredths Dollars, ($4,200.00) in the following manner: Within ten days from this date, the sum of One Hundred Seventy Seven and Forty Five One Hundredths Dollars, ($177.45); on February 1st, 1923, the sum of Fifty Five and no One Hundredths Dollars, ($55.00) and the same amount on the 1st day of each and every month thereafter, until the full sum of Forty Two Hundred and no One Hundredths Dollars, ($4,200.00) has been paid, or until the commission shall direct otherwise.

Dated at the City of Madison, Wisconsin, this 20th day of January, A. D., 1923.

Industrial Commission of Wisconsin, by F. M. Wilcox, R. G. Knutson, L. A. Tarrell, Commissioners. (Seal Industrial Commission Wisconsin.)

LAT:AMK.

[fol. 84] Before the Indutrial Commission of Wisconsin

Mary McLaughlin, Applicant,

vs.

Booth Fisheries Company, Respondent; Zurich General Accident Company, Insurance Carrier

Pursuant to notice fixing time and place for hearing, the above entitled matter was heard at Green Bay, Wisconsin, on January 12, 1923, L. A. Tarrell, Commissioner, presiding.

Applicant appeared in person and by her attorneys, Kittel, Jaseph & Young, by Mr. Jaseph; Respondent and insurance carrier appeared by Walter W. Savage, Adjuster.

Thereupon the following proceedings were had and the following testimony offered:

CONSTANCE HUEN, a witness called adversely by the applicant, testified as follows:

Mr. Jaseph:

Q. Mr. Huen, you work for the Booth Fisheries Company at their fish house in the city of Green Bay?
A. Yes sir.
Q. You live in the city of Green Bay?
A. Yes, on McDonald Street.
Q. What is your job?
A. I am doing everything—driving and everything, selling and everything there is to be done in the fish house.
Q. Yours is a day job?
A. Yes, mine is a day job.
Q. Did you know William McLaughlin?
A. I do.
Q. He worked there at the fish house also, did he not?
A. Yes, he worked with me there for eighteen or nineteen years.
Q. What was his job?
A. At the time?
Q. At the time of his injury, yes.
A. Night man,—watchman.
Q. Night watchman?
A. Yes sir.
Q. Did you come there the morning of the last day he worked?
A. I came there the day before and I told him in the evening, I say "Mac," I call him by the name Bill, like he call me Stance, I say, "will you feed my horse at three o'clock, I want to go out in the country with some fish" and then I get up at four and I can go out in the country and be back at six o'clock to leave you go home then, so the next morning I came down at about five minutes to four to the barn and I found the barn locked and it was a surprise to me to see the barn locked, so I went up to the fish house door and the door was hooked; I rapped three or four times and I don't get any answer so I [fol. 85] went and looked through the window and I rapped on the window and I see Mr. McLaughlin laying on the chair behind the stove, so I rapped again and he got up and opened the door for me,—unhooked the door and when I came in he says "Stance, will you take me to the chair in the office, I am sick," he says. So I did. I put him on to a chair and after I was there with him for a few minutes he says to me, "I wished I was home." Well I says, "Billy, if you want to go home," I say, "I never mind taking the stuff out in the country, get your stuff on I will take you home with the wagon," so at the same time I went to the barn and harnessed the horse up and got a few blankets in the wagon to get him home. Coming back, when he was ready he look around and he says "Stance, Mr. Smither, the cashier, gave me my check and I lost my money." I says, "Billy,

where did you lose it," so I take a lantern and commenced to go through the office, and when I get around the stove I find a whole pile he threw up—that he vomited up.

Q. Where abouts was that?

A. In the office of the Booth Fisheries Company, where he was sitting on that chair there.

Q. It was on the floor?

A. It was on the floor, yes, so then after that I got him—got his clothes on him I couldn't find the money so he wanted a drink of water out of the pail—a tin pail was standing on a pile of ice to keep the water cool and I told him not to drink so much water; he was drin*i*ng two or three cups, one right after the other and I told him not to drink so much cold water. I says, "Billy, haven't you got your money in your pocket," and he says "No, Stance"; I say, "Was you in the barn during the night and he says "no, I wasn't in no barn," and I looked through all around the first floor where the packing floor is and I couldn't see nothing and I say, "Billy, was you in Number 4, and he says "yes," and in that department I couldn't find no money when I go down there; I says "Billy, what hurt you through the gangway—that is between the two freezers—I went in there and I couldn't see any money so nothing was said any more and I say "Billy, you must have your money in your clothes; I say "Billy, have you got a pair of overalls over another pair of pants and so he unbuttoned his overalls and he looked and found his money right between the overalls and his pants, so then he was satisfied. Now he said, "count my money, Stance," and I counted it and it was a single paper dollar and one ten dollar piece and he say you put three dollars of this in my vest pocket and give me the rest of his money and then we will go home; so all right, the wagon was standing in front and I put him in the seat of the wagon and took him home and when I got there I carried him to the door and when I brought him up there I say "is that all Billy," and he say "yes, come and see me tomorrow. So that same night I went to watch in his place. I took the night watch job then for fourteen days and at the same time when I carried him up he say "see me tomorrow, so I watched that Saturday night and I went to see him and I say, "how do you feel, Billy—when I come out of that room there I have to be outside in the air.

Q. That room was No. 4?

A. No, that was in No. 1—No. 4 was the fresh fish room and that is all I could tell you people about it.

Q. This No. 4 you speak of and No. 1, are freezers?

A. Well No. 4 they use as a cooler through the summer to put the fresh fish in.

Q. It was in No. 1 you found him in, was it?

A. No, I did not find him in No. 1; I found him in the office.

Q. Did you go back to see whether the freezers had been opened at all?

A. No, I did not; I went in the gangway and looked for this money where he said he was in and I looked in No. 1.

Q. Were the freezers being used at that time as freezers?
A. Well that freezer wasn't used at that time; they were drying it out.
[fol. 86] Q. With a stove?
A. Yes.
Q. They were using what they call a salamander for that purpose?
A. No, they were using coke which I got at Hurlberts.
Q. But the stove was one of these stoves without a chimney?
A. With a platform over it.
Q. And you know it was coke they were burning in it?
A. Yes, I got it at Hurlberts.

Mr. Savage:

Q. Did you start the fire in that salamander?
A. No sir.
Q. Did you see the salamander?
A. No, I didn't.
Q. Do you know what was in the salamander, of your own knowledge?
A. Not at that time; I know I bought the stuff for it.

Mr. Savage: I don't think you need to lead this witness or suggest anything to him.

Mr. Jaseph:

Q. Mr. Huen, did you know there was a salamander in there? Did you see it?
A. Yes, I see it in there.
Q. And do you know that they had a fire in it of your own knowledge?
A. I would not say that night if they had it that night, but I see the stuff there and I bought the coke for it at Hurlberts.
Q. Did you look for it that day when you looked for his money?
A. I did not that morning; I would not say.
Q. Do you know whether there was a fire in it?
A. No, I wouldn't say, but that is what I bought the coke for so it wouldn't freeze and that is all I can tell you; that is all I know about it.
Q. Isn't it a fact that you picked this man up from the ground when you found him?
A. No sir, he was on the chair.
Q. Didn't you tell Mrs. McLaughlin you picked him up from the ground?
A. No sir, I did not.
Q. Weren't you in Pick's store at the time you told both Mr. Pick and Mrs. McLaughlin you picked this man up from the ground?
A. No sir, I told them both there that he was sitting on the chair behind the stove and I had to wrap so many times to come and open the door and when he opened the door then he asked me if I would take him back on the chair in the office and I did.

Mr. Savage:

Q. Did McLaughlin at that time tell you that he had been in No. 1 freezer?

A. The day after on Sunday when I went up to see him.

Q. He told you he had been?

A. In No. 1 freezer, yes, and he said he fall down on his knees and he come outside for a while and then he come in the office and that is all I could tell you about it, nothing at all more; just what I tell you is the way I find the man.

Q. How long had you worked for the Booth Fisheries?

A. Me,—I worked two years before they built their building; that must be now going on twenty seven or eight years.

Q. You have been in these different freezers at different times, have you not?

A. I went through all the freezers.

Q. On the top of these freezers on what is kind of the second floor, state whether or not there are openings about 12" wide and 18" long.

[fol. 87] Mr. Jaseph: That is objected to as incompetent, irrelevant and immaterial.

A. Certainly.

Com'r Tarrell: I suppose it is material whether or not the place was properly ventilated for the escape of gasses or whether there was gas in the freezers.

Mr. Savage:

Q. You can answer it,—state whether or not on the top of every one of these freezers or on what is the second floor, there are openings in the floor about 12" wide and about 18" long.

A. Certainly there are because that is where they shove the ice in to get the freezers down to zero.

Q. And when the freezer is not being used there is no ice in there?

A. No.

Q. When the freezer is being dried out with the salamander there is no ice in it?

A. No, they don't need any then; they want to get it dried out first to keep the tools——

Q. And do you know of your own knowledge about how many of these openings there are for each freezer, whether it is ten or twelve or fifteen or twenty or how many?

A. There are twenty one holes in No. 1.

Q. There are 21 holes?

A. In No. 1 and 24 in No. 4.

Q. There are twenty one openings around the sides and the top of No. 1 freezer?

A. Yes sir, there is.

Q. And each one of those openings is about 12" wide and about 18" long, is that a fact?

A. Well it might be; I wouldn't swear to that; I have never measured it.

Q. What is your opinion as to the size of each one of those openings? I don't care whether you give it in inches.

A. It might be 18" long, but I don't know for sure if it is quite a foot wide,—I will not say.

Q. But in your opinion they are about 18" long?

A. About 18 or 16" I couldn't tell you exactly; I didn't measure them you know.

Q. And then just give us your opinion as to how wide they are.

A. Well they might be about ten inches wide.

Q. Did you have any talk with McLaughlin the morning you were there, that is, when you took him home—did he tell you anything about what happened then?

A. Not a thing; all he said is he was sick and he lost his money and I looked for it and I found it, that is all; he was too sick, you know, to do any talking; you couldn't hardly get a word out of him.

Q. When was it he told you he had been in No. 1 freezer?

A. On Sunday, the next day, when I went up to talk with him; he told me I should come and see him and that is the time he told me that; that is all I know.

Q. And what did he tell you at that time?

A. At that time when he told me that, that is all; that is all he could tell me—he said he come out of No. 1 and fall on his knees.

Q. He came out of No. 1?

A. Yes, he was in No. 1.

Q. And after he came out of No. 1 freezer——

A. He fall down on his knees in the gangway he says.

Q. That was after he came out of the freezer?

A. Yes sir.

[fol. 88] Q. And the morning you found him he told you he was sick?

. Yes sir.

Mr. Jaseph:

Q. Did he tell you what he had been doing in No. 1?

A. No sir, he didn't tell me nothing about it.

Q. Do you know what he had to go into No. 1 freezer for?

Mr. Savage: Just a minute——

Mr. Jaseph: I am asking if you know, and not what he told you.

A. He didn't say nothing; he said he was in No. 1 and when he come out of No. 1 on the gangway he fell on his knees and that is all I can tell.

Q. You don't know what he was in No. 1 freezer for?

A. No. I don't know if he was ordered there or not; I wouldn't say.

Q. Was he apparently perfectly well the night before when you talked to him?

A. He was just so good to me as I ever know him.

Q. That was the time you asked him to fix up your horse for you at four o'clock?

A. Yes, to feed my horse at three in the morning.

Q. At that time he was as well as ever?

A. Yes.

Q. He wasn't a drinking man was he?

A. I don't think he ever took a drink in his life.

Q. And he didn't show any signs of being sick in any way, shape or manner?

A. No.

Q. Do you know whether these openings in the top of No. 1 or 4 freezers were open that night?

A. I will not say.

EMMA TOULE, sworn on behalf of the applicant, testified.

Mr. Jaseph:

Q. You are a resident of the city of Green Bay?

A. I am.

Q. And you are a teacher in the vocational school in this city?

A. I have been appointed as teacher, I am now in the office of the director of the vocational school.

Q. Are you a neighbor of the McLaughlins in the city of Green Bay?

A. Yes, I am.

Q. And how long have you been acquainted with them?

A. For a little over fifteen years.

Q. You lived you told me within two blocks of them?

A. Two or two and a half blocks.

Q. How often did you see Mr. McLaughlin?

A. Oh, I would see him at least once a week, almost every week, during the space of time I knew the family.

Q. He was quite an old man, was he not?

A. Yes, he was.

Q. What would you say as to his physical condition as compared with an ordinary man of his age?

A. I would say he was unusually sprightly and lively; his walk was very alert; he was a man who appeared to be in good health.

Q. Did you see him within a few days of his illness?

A. Yes, I saw him three days before.

Q. Was there anything at that time in his appearance which indicated ill health?

A. Absolutely nothing.

Q. What would you say as to the degree of education of this man?

[fol. 89] A. I would say he had a very meagre education.

Q. Was he the sort of man who would appreciate the effects of gas poisoning?

A. I think he knew nothing whatever about gas poisoning.

Mr. Savage: I object to that on the grounds that this witness is not competent to pass on such a question.

Com'r. Tarrell: It is probably asking for a conclusion.

Mr. Jaseph:

Q. You talked to him a great deal, did you?

A. Well I had talked to him on a great many occasions as you would a neighbor.

Q. Is he a man who would have the equivalent of a high school education?

A. He is not.

Q. Do you think he had a common school education?

A. I think less than the eighth grade.

Mr. Savage: That is all.

Mr. Jaseph:

Q. You of course know nothing about the accident itself,—did you talk with him when he was sick?

A. No sir, I did not.

Dr. E. S. Knox, being duly sworn on behalf of the applicant, testified as follows:

Mr. Jaseph:

Q. Doctor Knox, you are a resident of the city of Green Bay?

A. Yes sir.

Q. Are you licensed to practice medicine and surgery in the state of Wisconsin?

A. Yes sir.

Q. And you are practicing such profession in the city of Green Bay?

A. Yes sir.

Q. And did you serve in the army, Dr. Knox, in the medical corps?

A. I did, yes.

Q. Did you have any special training in connection with gas poisons in that service?

A. Yes sir, I did.

Q. To what extent,—just tell the commission.

A. I had four months' training at Blackwell, England, under Capt. McArthur of the Canadian Army.

Q. In that course did you go into the question of the effects of various gasses?

A. Yes sir.

Q. And the treatment for them, I suppose?

A. Yes.

Q. Are you the doctor who attended Wm. McLaughlin during his last illness?

A. Yes sir, I am.
Q. When were you called there, doctor?
A. October 7, 1922.
Q. Was that the same day of his illness?
A. Yes sir, it was.
Q. About what time did you get there?
A. About six o'clock in the morning.

[fol. 90] Mr. Savage:

Q. Are you positive that was the date of his first illness?
A. I am positive, yes sir.
Q. You are positive that it was Oct. 7th when he was first taken ill?
A. Yes sir.

Mr. Jaseph:

Q. And what did the patient tell you at that time as to the trouble from which he was suffering as a means of making a diagnosis in the case?

Mr. Savage: I object to that on the—on various grounds, as to what the patient told him at that time.

Mr. Jaseph: Well it is part of the history of the case.
Com'r Tarrell: He may answer, subject to the objection.

A. The patient was—was in quite a state of exhaustion and at that time he didn't tell me very much of anything.

Mr. Jaseph:

Q. Well what did you find; what was his condition at that time?
A. I found an elderly man, very much exhausted—in a state of exhaustion—loud, rapid breathing; he claimed, or rather his wife told me that he had some di-*ohr*-hœa; he had vomited and complained of some headache.
Q. What was his respiration?
A. Respiration 30, his pulse was slightly subnormal—his pulse *were* rapid and irregular.
Q. What was his temperature?
A. His temperature at that — was 98.
Q. You spoke about his rapid breathing; was there anything peculiar about his breathing otherwise?
A. It was loud and difficult and I examined his chest at that time and I found some tubular breathing throughout his chest in front.
Q. Did you examine his heart action?
A. Yes sir.
Q. You took stethescopic tests, I suppose?
A. Yes sir.
Q. What was the condition of his heart?

A. His heart was somewhat irregular, rapid, the volume was weak, slightly weak—to a certain extent.

Q. Did you have at that time anything on which you could determine the cause of his illness?

A. No, sir, I didn't.

Q. When did you see him again?

A. I saw him that same night at eight thirty.

Q. What was the condition at that time?

A. His condition was,—he was somewhat brighter and his respiration and pulse were about the same; the same condition as I found in the morning.

Q. Were you able to talk to him at that time?

A. Yes sir, I asked him how he was feeling and if he was any better and he answered me, he said he was quite weak and felt about the same.

Q. Did he tell you anything then as to what the cause of it was?

A. No sir, he didn't.

Q. Had you at that time formed any opinion as to the cause of his illness?

A. Yes sir.

Q. From what source?

A. Well from the history of the case and the symptoms I figured he had been affected with some accidental poisoning.

Q. Are you familiar with the symptoms of gas poisoning?

A. Yes sir.

[fol. 91] Mr. Savage: Let's specify what particular kinds of poisonings, etc.

Mr. Jaseph:

Q. Are you familiar with the effects of monoxide gas poisoning?

A. Yes sir.

Q. Were the conditions you found present there the ordinary symptoms of monoxide gas poisoning?

A. Yes sir.

Q. Did you find anything inconsistent with monoxide gas poisoning in the condition there?

A. No sir, I didn't.

Q. When did you see the patient again, doctor?

A. I saw him on October 13th.

Q. That would be a week from the time you first saw him?

A. Yes sir.

Q. You hadn't called during that time in between?

A. Yes sir.

Q. Was there a reason why you had not called?

A. One of the other doctors had been called in in the meantime.

Q. The company doctor in the meantime had been taking care of him?

A. No, two other doctors as far as I understand; I know of one

doctor who had been there and they told me the other doctor was there.

Q. What condition did you find on October 13th?

A. I found the patient was quite a little weaker and his condition was somewhat similar.

Q. What was the condition of his bowels at that time?

A. They told me they had been moving about every hour as I understand it.

Q. Did you talk with the patient that day as to what caused this condition?

A. Yes sir.

Q. What did he say as to the thing that brought about his condition?

A. Well he and his wife told me, that is——

Q. Confine yourself entirely to what he told you. What did he tell you about what had happened?

A. He told me he had been down at the Booth Fisheries and he had collapsed on his knees after having gone down to work.

Mr. Savage: After having done what, doctor?

A. He had gone to work.

Mr. Jaseph:

Q. Did he tell you anything about what he had been doing just before he collapsed?

A. No sir, I didn't ask him.

Q. Did he at any time tell you what he had been doing at the time?

A. No, I don't remember, about that.

Q. You can't distinguish between what you got from him and other people around him, is that the situation?

A. Well he and his wife told me at the same time.

Q. And did what his wife say take place in his presence?

A. Yes sir.

Q. And she did the talking and he laid there and listened to it, is that the idea?

A. Yes sir.

Q. Then what did she tell you under those circumstances?

A. She told me he had——

Mr. Savage: I object to that as hearsay; the woman is here herself.

Mr. Jaseph: Well it will be purely hearsay as to her part, but my point is that anything she said there in his presence, he making no [fol. 92] protest would be the same as if said by him.

Com'r Tarrell: I think there is a difference.

Mr. Jaseph:

Q. You were up there again the next day, the 14th, I believe?

A. Yes sir.

Q. Did you find any change that day?

A. I didn't examine the patient on the 14th.
Q. That was the day you found Dr. Bartran had been there?
A. Yes sir.
Q. Doctor, from your entire treatment of this case and your visits to the injured man you may state what your conclusion was as to the cause of his injury?
A. His injury was—my diagnosis was that he was suffering from carbon-monoxide poisoning.

Mr. Savage: I haven't any questions to ask.

Mrs. MARY MCLAUGHLIN, being duly sworn, testified.

Mr. Jaseph:

Q. Your name is Mary McLaughlin?
A. Yes sir.

Com'r Tarrell: Is there any dispute on the wage basis in this case?
Mr. Savage: $21.00 a week—$1,127.50 a year.

Mr. Jaseph:

Q. That is right, isn't it, he got $21 a week?
A. Yes.

Com'r Tarrell: And the parties were subject to the act?
Mr. Savage: Yes, all jurisdictional questions along that line are admitted.

Mr. Jaseph:

Q. How old are you?
A. I will be seventy three next month.
Q. And your husband was 77 was he?
A. Seventy seven the day he died,—the day after he died.
Q. He was 76 then and would have been 77?
A. He died Thursday and Saturday he would have been 77.
Q. Have you any children?
A. No.
Q. How long have you been married?
A. Fifty six years and three months.
Q. And you have lived in Green Bay about twenty years?
A. Twenty four.
Q. Was your husband in good health?
A. Perfect health; he never had been to a physician since I was married and that was—he had been—he only had two physicians since I was married and that was thirty five years ago and this last case.
Q. Was he feeble?
A. No, he was very healthy and strong for his age.

Q. Was he a drinking man?

[fol. 93] A. No sir.

Q. You know he hadn't touched liquor for years? I believe you told me that.

A. No, not since 1880, he promised his dying sister he would not touch anything and he hasn't touched a drop.

Q. What was his condition apparently when he went to work the night he was taken sick?

A. Well he left me just as hearty as any other evening, or as any other afternoon; he said a good name and that is the last I saw of him until the next morning when the man brought him home at half past four and left him in the door without any conscience,—he didn't know anything any more.

Q. Your husband at that time wasn't in condition to walk at all?

A. No, he couldn't speak.

Q. You called the doctor at once, did you?

A. Right away and Dr. Knox came about six.

Q. At that time did you know anything about what was the matter with your husband?

A. No, I didn't know until the next day, as this man who testified, came over to the house to see if he was able to go to work that night and he says 'say, Bill, did you get into that gas'? That is the first I heard of the gas. After he left I called my husband's attention and I says 'Billy, what is this about the gas'? He says Mr. Al Merrick, the foreman, told me to go in and stir the stove and shake the ashes but not to put any more coal on; he says I done that; when I came out he says I opened the front door wide and the rear door which goes on the dock. He says I went out on the dock and took in a fresh breath of air; then he says he come in and half way in the building my knees gave out; I fell, he says. He stood around so he don't go to sleep with the gas; he says he crawled around on my hands and knees; he says he got kind of weak and that is what he told me positively and Dr. Bartran took the statement in his book at the bed side and he says man if I lived to be seventy seven and be as well and strong as you are I would thank God; that is the words Dr. Bartran stated.

Q. Did he tell you at any other time about what had happened there?

A. Yes, he told me that just before they took him to the hospital; he says 'Ma, don't let them take me to the hospital; they will never bring me back.'

Q. But he told you about taking care of this fire, did he?

A. Yes sir.

Q. Did he have trouble with his bowels during all the time he was sick?

A. No, just at that time he was brought home.

Q. How often did his bowels move?

A. Pretty nearly every twenty minutes.

Q. And later on toward the end how often was it then?

A. Well he was taken to the hospital; I didn't see him every day, only Wednesday and Monday; I don't know how his bowels moved then.

Q. Did he vomit at home?

A. No sir, but he couldn't get no moisture in his mouth any more; he kept hollering for water and water.

Q. He was able to talk to you though practically all the time he was sick?

A. Not the last few days in the hospital.

Mr. Savage: No questions.

Mr. Jaseph: It is stipulated that consent was given by the wife for the holding of a post mortem; it is also stipulated on the record that an open salamander stove burning coke or coal will give off carbonmonoxide gas.

[fol. 94] ALBERT MERRICK, sworn adversely on behalf of the applicant, testified as follows:

Mr. Jaseph:

Q. Mr. Merrick, you are the foreman of the Booth Fisheries Co. are you not?

A. Yes sir.

Q. And did Wm. McLaughlin work under your directions?

A. Yes sir.

Q. He was the night watchman was he not?

A. Yes sir.

Q. Was it one of his duties to attend the fires in the salamanders——

A. Well no, he was—I told him to watch it a little,—to take a peak in there to see nothing else was burning.

Q. There was a salamander in more than one of the coolers that night?

A. No, just one.

Q. Which room was that in?

A. In No. 1 freezer.

Q. There was a fire in it the night he was injured?

A. Yes sir.

Q. And it was his duty to go into that freezer to see that that fire was all right?

A. Yes sir.

Q. Do you know whether it was unlocked?

A. It was unlocked, yes sir.

Q. Do you know whether he did open the stove that night?

A. No, I don't know anything about that.

Q. Did you see him at all after the injury?

A. No sir, I never saw him afterwards.

Mr. Savage:

Q. It is the usual custom, Mr. Merrick, to dry out these freezers with a salamander?

A. Yes, we generally do.
Q. How large is that freezer, that is, the dimensions?
A. It is about 17 x 17.
Q. And how high?
A. Eight ft.
Q. Is there a means and method of ventilation around the top of this freezer?
A. Well I don't know what that is—they were experimenting with those open ports up there.
Q. There is an opening, however, on each four sides of this freezer room?
A. Yes.
Q. At the top of the room?
A. Yes sir.
Q. And state whether or not there are openings on the second floor of the Booth Fisheries plant on top of freezer No. 1?
A. Yes, there is openings.
Q. The testimony shows there are twenty one of them; how many are there,—how many openings in Freezer No. 1?
A. Well I am not certain; I would judge about 18 or 20.
Q. And state the size, in your opinion, of each one of these openings.
A. About a two inch opening.
Q. I mean the holes in the floor.
A. Oh those are 8 x 14.
Q. 8 x 14?
A. Yes.
Q. When the freezer is being dried out, state whether or not the cover is removed from each opening on the top of the freezer.

[fol. 95] Mr. Jaseph: That is objected to as incompetent, irrelevant and immaterial; the question is was it done in this case and not what the general custom is.

Com'r Tarrell: He may answer.

Mr. Savage:

Q. When the freezer is being dried out, state whether or not the covers over where these openings are removed.
A. They are removed when there is no fire in there and when there is a fire in there they are closed.
Q. Were they closed on the night that Mr. McLaughlin was taken sick at the plant?
A. I think there were two holes open.
Q. And the rest were closed?
A. Yes.
Q. You had no talk with Mr. McLaughlin after he was taken home sick?
A. No sir.

Mr. Jaseph: That is all.

TOM JORGENSEN, sworn on behalf of the applicant, testified:

Mr. Jaseph:

Q. You are the local superintendent of the Booth Fisheries in Green Bay?

A. Yes.

Q. And have been for several years?

A. Yes sir.

Q. Did you, following the injury to Wm. McLaughlin, call at his home several times?

A. I called once.

Q. Was you there only once?

A. Just once.

Q. You talked with him at that time?

A. Yes.

Q. Did you make a statement to him something like this, 'you old chump, what do you mean by sticking your nose over that salamander and getting yourself filled with gas'?

A. No.

Q. Or anything of that nature?

A. No sir.

Q. What did you say to him?

A. All I can remember is I was called over there and I asked what was wanted and he said he wanted his insurance taken care of and I said you don't need to worry it that is all you want with me, you don't need to worry because your insurance will be taken care of.

Q. Is that all the talk you had with him?

A. That is all I can remember.

Q. Did you call him down?

A. I called him down for having lots of cats in the house and a dirty house and I asked them what they did with all his money which we had been paying him for years and I told him to open the doors or rather his wife.

Q. But you didn't say anything about getting his nose full of gas over that salamander?

A. I might have said something about it but I didn't call him down; I knew Billy too well for that.

Q. You say you did say something perhaps about it?

A. I don't remember.

Q. Did you have a report from your employees he had been gassed there?

A. I believe the old driver called on him and I asked him what is the matter with him and he said he had been gassed or that Dr. [fol. 95] Johnson said he was gassed—something to that effect.

Q. Don't you remember saying to Mr. McLaughlin why did you stick your nose over that salamander——

A. I might have said that to him.

Q. You figured he didn't have any business to open that stove?

A. You can't open that stove; there is no stove to open; a salamander is nothing but a cast iron pipe or boiler iron pipe with coke in it and a draft underneath and there is nothing to open; it is open.

Q. But didn't he tell you he had stirred it up—that is McLaughlin did?

A. No; he didn't tell me that.

Q. You say there is nothing over it; how do they put the coke in it?

A. There is a plate on the bottom or a little ways up and you put it right in from the top.

Q. There is a top there?

A. Yes, there is an opening, there, but there is no door or anything like that.

Q. There is an open top all the way down?

A. It is nothing but an open fire, you might say.

Com'r Tarrell:

Q. Did you visit this freezer the next morning after he was taken sick?

A. Yes.

Q. Did you go inside?

A. Yes.

Q. How long were you in there?

A. I was in there long enough to take a good look; I could have stood it there for five minutes because the doors—the gates are open all around the fire.

Q. You are sure the gates were open?

A. Yes.

Q. How positive are you of that; did you look at them?

A. Yes, I went up stairs.

Q. Was Mr. Merrick in there that morning too?

A. I didn't see him in there.

Q. He wasn't?

A. He is the foreman; he is the man who gives the orders—to the old man to open up the freezer doors and take a look at the—in the freezer to see if everything was all right.

Q. He gave orders to McLaughlin to do that?

A. Yes, to see that everything was all right; he never got orders to look in that salamander at all.

Q. But Merrick testified he had orders to look in there to see everything was all right and nothing else was burning.

A. To look in the freezers, yes; to look and see that everything was all right.

Q. Mr. Merrick testified that only two of these openings were open—that the rest had caps on or were covered.

A. Then his testimony must be right.

Q. When did you first go in there after this man became sick?

A. As soon as I got over there.

Q. What time in the morning?

A. I would judge about seven or eight o'clock.

Q. Was there gas in the freezer then?

A. Yes, the gas stays there a long time after that.

Q. Was the salamander burning or had the fire burned out?

A. It was burning; there will be gas quite a while after it goes out even.

Q. How long could you stay in there?

A. I couldn't tell you; I never tried it.

Q. How long did you stay in there?

A. I walked in and looked around and walked out again.

[fol. 97] Q. How long would that take?

A. Perhaps several minutes.

Q. And why didn't you stay longer?

A. Because I had no business to stay there any longer.

Q. Why?

A. Well what would I stay there for?

Q. Well why did you want to get out?

A. I had no business in there; I had business in the office to do.

Q. Well there was gas in there?

A. Yes there couldn't help but be gas.

Dr. W. H. Bartran, being duly sworn on behalf of the respondent, testified as follows:

Mr. Jaseph: Qualifications admitted.

Mr. Savage:

Q. Doctor Bartran, were you called to see a man named William McLaughlin along about October 6, 1922?

A. I was called,—I saw him on the 9th of October.

Q. What day did he die, doctor?

A. He died on October 19th.

Q. How many times between the 9th and 19th did you see Mr. McLaughlin?

A. I saw him the first time on the 9th; I saw him the second time the 13th, again on the 15th and then after that once or twice a day until he died.

Q. From what was he suffering at the time you saw him during this period of time?

A. He complained of general weakness and dyssentary.

Q. Following his death, doctor, did you perform an autopsy or post?

A. Yes.

Q. Will you kindly state the—what the findings were at this post mortem examination? You can go right ahead in narrative form and tell what you did and what you found.

A. I found an emaciated, elderly man, the general coloring of the skin was very blanch and white; the dependent portions of the body were discolored,—dark; they were the post mortem changes which usually take place. The finger nails were very dark; the chest was opened; on the left side there was no fluid in the pleural cavity; the left lung, upper lobe, was collapsed. A number of sears of old tubercular lesions in the apex, healed; posteriorly in the lower lobe was an area, the size of a large hen's egg with the findings of

pneumonia of a number of days duration. This was substantiated by the miscroscopical findings afterwards.

Q. Slides were made and the diagnosis was pneumonia?

A. Pneumonia on the left side,—the lower lobe. The right lung was adherent to the external wall—chest wall, due to an old adhesion that included the whole pleural cavity on the right side. This was of long, long duration, a great many years probably, and probably was originally a tubercular lesion. The upper lobe was oedematous and there was considerable fluid in it; the lower right lobe contained a large pneumonic mass; there was a large part of this lobe involved with pneumonia and this was also substantiated by the miscroscopical examination. The heart was normal in size; there was a general old miocarditis,—a chronic miocarditis,—a fatty degeneration; the walls of the heart were very thin and the right ventrical was very very thin indeed—it was quite a bit thinner than you would usually find; the mitral valve had an old valvular lesion and attached to this valve was a thrombus—which it was very very hard to separate from the valve itself; this thrombus was long,—5½" [fol. 98] long and extended up through the aortic valve and into the aorta itself and in the arch of the aorta.

Q. Extended clear into the arch of the aorta.

A. Yes; this was not a—it was very fine in texture; the blood was very dark and venous in color—in the vessels and in the tissues of the body; there was a change in the liver,—a chronic epididymitis —that is, a mottled condition of the liver. The liver was slightly hardened and slightly small; the stomach was normal; no evidence of an ulcer in the stomach or in the bowels; the gall bladder was normal; both the large and small intestines were normal; the right kidney—was small and the left also; there was evidence of a nephritis; from the post mortem findings one would say he died from a pneumonia and uraemia from a nephritis, complicated with a mitral valve lesion and an arteriosclerosis general.

Q. Was there at any time any indication of carbonmonoxide poisoning in this man or was such a condition shown as a result of your post?

A. On the postmortem there was no evidence of a carbonmonoxide poisoning. Death from a carbonmonoxide poisoning is an easy asphyxiation and it either comes suddenly with a tremendous doze of the gas where the person drops over dead or is a long prolonged exposure over a great many days to a small amount of the gas and then there is the death caused by an exposure for half an hour or for an hour and with a carbonmonoxide poisoning there is a typical condition in the blood caused by the uniting of the gas with the haemoglobin in the blood forming a quite a prominent union with the haemoglobin in the blood so that the blood can't become oxygenated and this condition gives rise to a very very bright red condition of the blood,—a cherry red and this endures for some time after the posioning, and anybody who dies from a carbonmonoxide posioning would have this typical condition of the blood so you couldn't mistake it.

Q. And that condition as described by you was not present in the case of Mr. McLaughlin?

A. No; you take a pneumonia that results from inhalation of gas, in the first place you don't get the kind of pneumonia which we had in this case; we had a lobar pneumonia here and in an inhalation pneumonia you get a bronchial pneumonia; that is due to the irritation of the gas; a carbonmonoxide gas is a non-irritating gas and doesn't produce an irritation of the lungs.

Q. And the lobar pneumonia you speak of, state whether or not that is a common condition that you find in elderly people when they are confined to their bed?

Mr. Jaseph: We object to that question as being a hypothesis not shown in this case.

Com'r Tarrell: Of course if it is not based on the evidence in the case it is of no value; he may answer, subject to your objection.

Mr. Savage: I will withdraw the question.

Q. From the condition found at the post, doctor, state whether or not in your opinion it would be possible for a doctor to diagnose the cause of death in Mr. McLaughlin's case without the post.

A. Without the post,—no, you couldn't do it.

Mr. Jaseph:

Q. Doctor, if added to the facts which have been put into this last question, there is a further one, that the history of the case showed an exposure to carbonmonoxide gas—

Mr. Savage: Just a minute; there is nothing shown here to that effect.

[fol. 99] Mr. Jaseph:

Q. Your answer would not be the same, would it? If added to the facts you had in your possession prior to making this post mortem, if you had a history of the case which showed exposure to carbonmonoxide poisoning, you wouldn't give that same answer, would you?

Mr. Savage: I object to that for the reason there is no history shown here of exposure to carbonmonoxide gas.

Mr. Jaseph: Yes, there is the circumstances——

Com'r. Tarrell: You may answer.

Q. That I just gave——

Mr. Jaseph:

Q. That it was impossible for a doctor to tell what the cause of death was. You made that statement a moment ago, that without a post mortem it would be impossible for a doctor to tell what the cause of death was.

A. Yes.

Q. If you had this added fact which I have given here, you wouldn't need a post mortem to give such opinion?

A. You couldn't tell what he died from with any history of the case.

Q. You couldn't probably tell the immediate cause, but you could tell the inducing cause, couldn't you?

A. No, you couldn't.

Q. How long after the death was this post mortem made?

A. He died the 19th and the post mortem was made the 21st.

Q. Two days later?

A. Yes.

Q. Isn't it a fact that the medical authorities recognize the fact that this cherry color of the blood doesn't always persist after death?

A. It would be evidenced so that if the carbonmonoxide poisoning was the cause of death you would find it.

Q. Do not the medical authorities state that generally it is present but not always after death?

A. That is qualified.

Q. Isn't that what Billings says about it?

A. I don't know what Billings says about it, but it is qualified this way, that if the death is by a tremendous dose of carbonmonoxide, where the death is instantly or almost instantly, just within a short time, you don't get that condition, but if it is over a prolonged exposure then you do get it.

Q. Isn't it almost always the case with the discoloration of which you testified either of the tissues, following death, that that effects also the blood as well as the other tissues, so you don't have the true cherry color preserved or any color of that nature?

A. You do where the death—where the exposure has occurred over some time—where the exposure to carbonmonoxide is of some duration.

Q. What do you mean 'of some duration'?

A. Several hours to—day by day.

Q. Assuming here the exposure had been for several hours then would that effect your answer?

A. No, for the reason that he didn't die until the 19th and he was exposed several days before—if he was exposed.

Q. You stated that in your mind his death was due to pneumonia and uraemia from a nephritis; nephritis is bright's disease, as I understand it?

A. Yes.

Q. What evidence of Bright's Disease did you find here?

A. He had urinary findings.

Q. What were they?

A. Albumen and granular casts.

Q. Don't you also find those following carbonmonoxide poisoning? [fol. 100] A. No sir.

Q. Isn't that a common accompaniment?

A. Not at that time; you might find it—not always, but you might find it immediately after—after a tremendous dose.

Q. Don't the medical authorities recognize that as a common accompaniment to carbonmonoxide poisoning?

A. I wouldn't say that.

Q. Don't Billings say so?

A. I don't know what he says.

Q. Isn't Billings a recognized authority on that subject—toxicology?

A. Well he is—stands very high in medicine.

Q. Also now in reference to the fatty degeneration, that is found both in the tissues and in the heart, isn't that also a very frequent manifestation following monoxide gas poisoning?

A. Well you get a degeneration of the tissues.

Q. That is almost inevitable?

A. Because they are not properly oxyginated.

Q. What is there, doctor, in this case, outside of what you say as to the color of the blood which pointed away from the theory of monoxide gas poisoning?

A. Well he had a pneumonia there enough to cause any man's death.

Q. Well wouldn't that be the very first result which would come from monoxide gas poisoning?

A. No sir.

Q. Do you mean to deny that pneumonia would be apt to develop in those cases?

A. That would be quite out of the ordinary.

Q. It would be out of the ordinary?

A. Out of the ordinary, yes sir.

Q. Did you make any blood tests of this man during his life time; you did not, I assume.

A. Yes, we made a test of his blood; that is as to the haemoglobin and the leucocytas—leucocyte count.

Q. During his life time?

A. Yes.

Q. What did you find on that examination?

A. We found haemoglobin seventy per cent, and leucocyte count 5,800.

Q. Seventy per cent normal?

A. Yes; and the normal would be about eighty five or ninety per cent. It never runs a hundred.

Q. You meant seventy per cent of the entire blood content?

A. We always designate it that way.

Q. And it was about 15% less than normal?

A. Yes.

Q. Well twenty per cent less than normal is invariably fatal, isn't it?

A. Oh, no; you can have haemoglobin thirty five and forty per cent and have the patient walking around.

Q. Am I mistaken in asserting that Billings states that twenty per cent is necessarily fatal—that is reduction in haemoglobin?

A. Well you can have them live when they have twenty per cent; you must mean twenty per cent of the total amount; if it reads twenty per cent.

Q. Twenty per cent of the total amount of haemoglobin.

A. In a reduction of twenty per cent.

Q. I mean a reduction of twenty per cent?

A. They will walk around with thirty and thirty five per cent.

Q. Isn't it a fact doctor that on your first examination of this patient you made a stethoscopic examination for the purpose of determining whether or not his heard actions were normal and you found it as good as could be expected in a man of his age?

A. Yes.

Q. You found no evidence of any abnormality there, did you?

A. No.

Q. What did you find as to the lung action; what was indicated there?

[fol. 101] A. I didn't find a pneumonia there; I never was able to find it.

Q. And that was three days after his attack?

A. Yes, but I never found a pneumonia there up to the time he died; not by a stethoscopic examination.

Q. Isn't it a fact doctor, that an elderly man confined to his bed for a period of ten days, that a pneumonic condition might develop independent of the original cause of his illness?

A. You do sometimes where they are lying on their back and not moving around.

Q. You know from the history of this case that this man laid there for ten days or more before his death?

A. Yes.

Q. So that might have developed subsequent to the original injury or whatever it was which brought this on?

A. Well a pneumonia of that kind was—it was an old pneumonia which had been there a number of days; just when that started, I couldn't say.

Q. But the fact that you found no indication of that on your stethoscopic examination would indicate that under ordinary circumstances it wasn't present when you made that examination, wouldn't it?

A. Well a pneumonia in an old person is hard to get very often.

Mr. Savage:

Q. It is common, is it not, doctor, to find a lobar pneumonia in an elderly person that has been confined to his bed for some period of time, a few days or longer.?

A. Yes, you find it.

Q. And this pneumonia which you found at the post mortem was a lobar pneumonia?

A. Yes, lobar.

Q. And a lobar pneumonia is not such a pneumonia as follows a carbonmonoxide poisoning?

A. No; you get a bronchial pneumonia if it is from a gas poisoning; carbonmonoxide doesn't give pneumonia ordinarily; it must be mixed with something else.

Q. Then doctor, based on your knowledge as to the effects and results in carbonmonoxide poisoing on the body and its parts, and

based on your autopsy held in this case, it is your opinion that this man did not die as a result of exposure to carbonmonoxide gas?
A. Yes sir.

Mr. Jaseph:

Q. Doctor, I think you told me you were not familiar with this particular work?
A. No.
Q. On page 741 of Billings, Vol. 1, internal diseases, occurs this statement—'pneumonic charges in the lungs are frequently observed'. Isn't that a correct statement of the facts?
A. What does that have reference to?
Q. Referring to poisoning from carbonmonoxide. I will give the volume so you can see it.
A. That is what it states there.
Q. Isn't that in accordance with general authorities on the subject?
A. Well I can show you.—I haven't the work here, but I can show you where it states it isn't common but that it is only when they have pneumonic change it is secondary to something else.

Mr. Savage:

Q. Doctor, if a pneumonia were produced following an exposure to carbonmonoxide gas, when it would develop,—immediately or after some days.
A. Granting that the gas causes the pneumonia?
Q. That is what I mean.
A. Granting that,—and carbonmonxide is a non-irritating gas, [fol. 102] and doesn't cause any irritating effect in the lung, but supposing it did cause a pneumonia, it would be immediately after the inhalation.

Mr. Jaseph:

Q. About that question of the reduction of the haemoglobin; there isn't any that the oxygen carrying powers of the blood depends on the amount of haemoglobin?
A. No.
Q. That is the oxygen carrying element in the blood?
A. Yes.
Q. I am now again referring to page 740 of that same work as before,—death results when the respiratory capacity of the blood is reduced from twenty to thirty per cent. Wouldn't the reduction of the haemoglobin in that percentage cause that reduction of the respiratory capacity of the blood spoken of there ?
A. Twenty or thirty per cent in the haemoglobin?
Q. So I am correct in my statement although I didn't give the larger figure from twenty to thirty per cent, reduction would be sufficient to be fatal?
A. Yes.
Q. So a fifteen per cent reduction would be well within the danger line.

A. Well I believe the average person who comes to the office sick,—that the general run wont go over seventy per cent of haemoglobin; that is the average sick person coming into the office and we often have people come in with fifty and fifty-five and sixty, per cent; that is, aenemic people.

Q. You are speaking of people otherwise subnormal physically?

A. Well sick people, yes.

Dr. KNOX recalled.

Mr. Jaseph:

Q. Doctor, what is the recognized,—what do recognized medical authorities state as to the presence of the blood red colors in the tissue following death from monoxide gas poisoning?

A. Cherry red.

Q. Is there any exception to that rule or is it a fact that sometimes that is not present after death?

A. If death—after death, some of the medical authorities state they are present in some cases.

Q. What is the fact whether or not sugar and albumen are found in the liver or in the kidneys following monoxide gas poisoning, frequently?

A. Sugar is found in seventy per cent according to the greatest medical authorities and albumen or nephritis is found in—according to the war records, is found in all cases of poisoning—carbonmonoxide poisonings and in all cases of gas poisoning.

Q. I think Dr. Bartran admitted that fatty degeneration of the heart also followed that. In your original examination of this patient, stethescopic examination, and otherwise, what did you determine as to the condition of the lungs; I think you covered that.

A. The first thing which lead me to examine the lungs was the rapid respiration he had a respiration of thirty and upon stethescopic examination I found tubular breathing throughout.

Q. Is that necessarily related to pneumonia?

A. Well yes.

Q. Would you call that a pneumonic condition?

A. Not necessarily.

Q. But it might be?

A. It might be.

Q. And you found those indications present at that time?

A. Yes.

Q. What is the fact whether monoxide gas sometimes will produce this peneumonic condition?

[fol. 103] A. It does.

Mr. Savage:

Q. Does carbonmonoxide gas ordinarily cause lobar pneumonia, doctor?

A. It may cause a pneumonic condition throughout the lungs, either lobar,—that is, in the first stages it may be tubular—bronchial, but after a man is lying on his back for a while and in a lying position, then is when any kind of pneumonia might develop.

Q. Doctor, state whether or not you fairly frequently find lobar pneumonia in elderly people who are confined to their bed for a period of time.

A. You may find it, yes.

Q. And quite frequently, do you, doctor?

A. In certain cases you find it.

Q. It is not a fact when you treat an elderly person who has been active—and who is confined to his bed you invariably watch out and fear lobar pneumonia?

A. Yes, you fear a congestion of the lungs.

Q. Fatty degeneration of the heart is caused by other conditions than carbonmonoxide poisoning, is it not?

A. Yes.

Q. And you fairly frequently find that in post mortems?

A. Yes sir.

Q. Sugar in the urine may result from many causes aside from carbonmonoxide poisoning?

A. Not many.

Q. Do you not frequently in your examination of urine find sugar and albumen?

A. In what kind of cases do you mean?

Q. In examinations,—you examine the urine of people coming to your office frequently, do you not?

A. Yes.

Q. And very frequently you find sugar and albumen in the urine, do you not?

A. No, I do not.

Q. What other causes or what would cause sugar and albumen aside from carbonmonoxide poisoning?

A. You may find sugar in a puncture of the third ventricle—diabetes.

Q. In nephritis?

A. No, we find albumen in nephritis—you find albumen in such patients with nephritis.

Q. So you could not definitely state if there was albumen and sugar in the urine of Mr. McLaughlin that it was directly caused by carbonmonoxide gas poisoning alone?

A. From the history and examination of the case, yes sir.

Q. You could state then in this particular case that nothing else could cause it?

A. Yes sir.

Mr. Savage: That is all.

Mr. Jaseph: That is all.

[fol. 104] [File endorsement omitted]

IN CIRCUIT COURT DANE COUNTY

[Title omitted]

DIRECTIONS FOR JUDGMENT—Filed in Circuit Court Nov. 28, 1923; in Supreme Court March 8, 1924

By the COURT:

The question whether the workmen's compensation act deprives plaintiffs of due process of law, because it does not provide for a full judicial review of the facts, is not an open one in this court, nor indeed in this state. In John Haluska v. Industrial Commission, decided by this court December 14, 1920, and in American Hide & Leather Co. v. Moldenhauer, decided by this court July 5, 1921, the court considered the position now taken by plaintiffs and reached the conclusion that the rule stated in Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 289; 64 L. Ed. 908, 914, did not apply to proceedings under the Wisconsin workmen's compensation act. The making of a rate by a utility commission is a compulsory process based upon the paramount right of the public to have the service furnished by the utility at a reasonable rate. When an order of an administrative commission fixing such a rate is reviewed, the utility has given no consent that the order shall be reviewed by any other procedure than that which prevails in the ordinary civil action in which both parties are entitled to a trial de novo.

But the rights of the parties to the present action are to be determined upon a very different basis, because they have elected to come under the workmen's compensation act, thereby consenting that the findings of the commission shall be final if they are supported by substantial credible evidence. In view of such consent, [fols. 105 & 106] if the evidence is sufficient to support the findings, "no man * * * is deprived of his right to 'due process of law' thereby." Borgnis v. Falk Co., 147 Wis. 327, 361. It is the fact that the plaintiffs would not be subject to the provisions of the workmen's compensation act which they attack if the employer had not elected to accept every provision that the plaintiffs now seek to question that relieves the court from all consideration of questions whether a compulsory act containing the provision here in question would offend "against those clauses of the state and federal constitutions which guarantee all citizens against the deprivation of property without due process of law." Borgnis v. Falk Co. 147 Wis. 327, 350.

The Iowa Workmen's compensation act is an elective act evidently modelled upon the Wisconsin law. The supreme court of the United States held that the Iowa law, which gave "no appeal upon questions of fact" but did provide for "a hearing before an administrative tribunal and for judicial review upon all fundamental and jurisdictional questions," did not clothe an administrative body "with

an arbitrary and unbridled discretion, inconsistent with a proper conception of due process of law." Hawkins v. Bleakly, 243 U. S. 210, 215, 216; 61 L. Ed. 678, 684.

Counsel for plaintiffs concede that there is some substantial credible evidence to support the findings of the commission. It follows that the award must be confirmed. The attorney general may prepare the proper judgment, submitting the same to opposing counsel before it is presented for signature.

Dated November 28, 1923.

[fol. 107] [File endorsement omitted]

STATE OF WISCONSIN:

IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

JUDGMENT—Filed in Circuit Court Dec. 28, 1923; in Supreme Court March 8, 1924

At a Regular Term of the Circuit Court for Dane County, Wisconsin, Begun and Held at the Court-house, in the City of Madison, in said County.

Present: Honorable E. Ray Stevens, Circuit Judge, Presiding.

The above entitled matter coming on for hearing before the court, without a jury, upon the return of the above named defendant, Industrial Commission, Freeman and Bendinger appearing for the plaintiffs, Winfield W. Gilman, Assistant Attorney General, and Frank A. Ross appearing for the defendant, Industrial Commission of Wisconsin, Kittell, Jaseph & Young, appearing for defendant, Mary McLaughlin, and there being no other appearances, and the court having heard the arguments of counsel and being fully advised in the premises, and having on the 28th day of November, 1923, filed its directions for judgment, confirming the award of the Industrial Commission,

Now, therefore, on motion of the said attorneys for the Industrial Commission of Wisconsin,

It is adjudged That the order of the Industrial Commission of Wisconsin, dated January 20, 1923, awarding to the defendant, Mary McLaughlin, against the plaintiffs, Booth Fisheries Company and Zurich General Accident Company, certain sums as death benefits because of the death of her husband, William McLaughlin, be, and [fols. 108-114] the same hereby is, in all respects confirmed.

Dated at Madison, Wisconsin this 28th day of December, 1923.

By the Court:

E. Ray Stevens, Judge.

[fols. 115-118] In Circuit Court of Dane County

Clerk's Certificate—Filed in Supreme Court March 8, 1924

Dane County, ss:

I, Herbert F. Hansen, Clerk of said Court, do hereby certify that the foregoing and annexed paper writings are the original Summons & Complaint with Proof of Service, Answer of Industrial Commission, Return of Industrial Commission, Directions for Judgment, Judgment, Notice of Entry of Judgment, Notice of Appeal to Supreme Court, which has been filed in my office in the action wherein Booth Fisheries Company and Zurich General Accident & Liability Insurance Corporation, Limited, plaintiffs, and Industrial Commission of Wisconsin and Mary McLaughlin, defendants, and that the same are hereby transmitted to the Judges of the Supreme Court, of the State of Wisconsin, in pursuance of said notice of appeal.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at the City of Madison, in said County, this 7th day of March, A. D. 1924.

Herbert F. Hansen, Clerk, by Mary Grane, Deputy Clerk.
(Seal) Circuit Court Dane County, Wisconsin.

[File endorsement omitted.]

[fols. 119 & 120] In Supreme Court of Wisconsin

[Title omitted]

Judgment—Nov. 11, 1924

This cause came on to be heard on appeal from the judgment of the Circuit Court of Dane County, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the Circuit Court of Dane County, in this cause, be and the same is hereby affirmed.

[fol. 121] In Supreme Court of Wisconsin

[Title omitted]

Appeal From a Judgment of the Circuit Court for Dane County; E. Ray Stevens, Circuit Judge. Affirmed

Opinion

Owen, J.:

This is an appeal by an employer and its insurance carrier from a judgment of the Circuit Court for Dane County affirming an award

of the Industrial Commission made in favor of an employe. The only question raised is the constitutionality of a portion of the Workmen's Compensation Act. To induce a better understanding of the exact question presented its statement should be prefaced by a recital of the general provisions of the Workmen's Compensation Act. To that end, we quote from Borgnis v. Falk Co., 147 Wis. 327, at p. 346:

"It creates an administrative board to carry its provisions into effect; it divides all private employers of labor into two classes: (1) [fol. 122] those who elect to come under the law, and (2) those who do not so elect; it takes away the defenses of assumption of risk and negligence of a co-employee from the second class (except that where there are less than four co-employees the latter defense is not disturbed), but leaves both defenses intact to the first class; it prescribes the manner in which an employer may elect to come under its terms, and how an employee may make his election and when silence on the part of the employee will be considered an election, but it does not in terms compel either employer or employee to submit to its provisions. It then provides a comprehensive scheme by which, after both parties have so elected, any substantial injury, whether the result be fatal or not, received by the employee in the course of or incidental to his employment (except those caused by wilful misconduct) shall be compensated for by the employer according to certain definite rules, which rules are to be administered by the administrative board aforesaid by means of simple procedure definitely laid down, which gives to both parties fair notice and hearing, and results in findings and an award which may be filed in the circuit court and become a judgment. It further provides that the findings of fact shall be conclusive and the award subject to review only by action in the circuit court for Dane county, in which it can be set aside only (1) if the Commission acted without or in excess of its powers; (2) if the award was procured by fraud, or (3) if the award is not supported by the findings of fact. It then provides that the judgment thus rendered shall be subject to appeal to the supreme Court."

The provision of the law which appellants challenge as unconstitutional is that authorizing a judicial review of the awards of the Industrial Commission as provided in sec. 102.23 Stats. That section reads as follows:

"The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive; and the order or award, either interlocutory or final, whether judgment has been rendered thereon or not, shall be subject to review only in the manner and upon the grounds following: Within thirty days from the date of the order or award, any party aggrieved thereby may commence, in the circuit court for Dane county, an action against the commission for the review of such order or award, in which action the adverse party shall also be made defendant. In such action a complaint, which shall state the grounds upon which a review is sought, shall be served with the summons. Service upon the secretary of the

commission, or any member of the commission, shall be deemed completed service. The commission shall serve its answer within twenty days after the service of the complaint, and, within the like time, such adverse party shall, if he so desires, serve his answer to said complaint. With its answer, the commission shall make return to said court of all documents and papers on file in the matter, and of all testimony which may have been taken therein, and of its order, findings and award. Such return of the commission when filed in the office of the clerk of the circuit court shall, with the papers mentioned in section 2898 of the statutes, constitute a judgment roll in such action; and it shall not be necessary to settle a bill of exceptions [fol. 123] in order to make such return part of the record of such court in such action. Said action may thereupon be brought on for hearing before said court upon such record by either party on ten days' notice to the other; subject, however, to the provisions of law for a change of the place of trial or the calling in of another judge. Upon such hearing, the court may confirm or set aside such order or award; and any judgment which may theretofore have been rendered thereon; but the same shall be set aside only upon the following grounds:

(a) That the commission acted without or in excess of its powers.

(b) That the order or award was procured by fraud.

(c) That the findings of fact by the commission do not support the order or award.

(2) Upon the trial of any such action the court shall disregard any irregularity or error of the commission unless it be made to affirmatively appear that the plaintiff was damaged thereby.

(3) The record in any case shall be transmitted to the commission within twenty days after the order or judgment of the court, unless appeal shall be taken from such order or judgment.

(4) Whenever an award is made against the state the attorney-general may bring an action for review thereof in the same manner and upon the same grounds as are provided by subsection (1) hereof."

It is settled by the decisions of this court that findings of fact made by the Industrial Commission cannot be disturbed if there is any evidence to support them. Northwestern Iron Co. v. Industrial Commission, 154 Wis. 97; City of Milwaukee v. Industrial Commission, 160 Wis. 238; Milwaukee Coke & Gas Company v. Industrial Commission, 160 Wis. 247; William Rahr Sons Co. vs. Industrial Commission, 166 Wis. 28.

It is contended that this provision for a judicial review, as so construed, does not amount to due process of law because it does not provide for an independent judicial determination of the facts as well as the law. Counsel for appellants rely principally upon Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287 which they say establishes the proposition that "If the original hearing is before a commission, and the evidence then taken, in any event there must be

a fair 'opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and [fol. 124] facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment.'" We shall not enter upon a discussion of the elements necessary to constitute due process of law in statutes providing for a judicial review of the determinations and orders of governmental administrative boards and commissions, for the reason that we do not consider that appellants are in position to raise that question.

A general assault was made on the constitutionality of the Workmen's Compensation Act in Borgnis v. Falk Company, 147 Wis. 327. The present contention was then disposed of in the following language, to be found on page 350:

"Passing to the consideration of the contentions made in the present case, we note in limine that this is not a compulsory law; no employer is compelled to pay damages to an employee without having had his day in court. It is true that the argument is made that the law is practically coercive, but that argument is not regarded by us as sound, and will be taken up and treated later in this opinion. We are therefore relieved from all consideration of the question whether a compulsory compensation act offends against those clauses of the state and federal constitutions which guarantee all citizens against the deprivation of property without due process of law."

Over a period of thirteen years during which time every employer of consequence has accepted the provisions of the law, acted under it, and paid the compensation for injuries provided by it, this disposition by the court of the question here presented has apparently met with universal acquiescence. Was the court in error in thus disposing of the question in Borgnis v. Falk Company and have those who have accepted the act inadvertently submitted to a deprivation of their property without due process of law? We think that a reference to a few fundamental principles will demonstrate that they have not.

It is well settled that constitutional rights, as well as any other personal or property right, may be waived. Oborn v. The State, 143 Wis. 249; Finsky v. State, 176 Wis. 481; Silber v. Bloodgood, 177 Wis. 608. The only exception to this principle that we recall is the [fol. 125] right of the defendant in a criminal case to waive a trial by jury. Oborn v. State, 143 Wis. 249; State v. Smith (Wis.), decided October 17, 1924. Even this exception is against the weight of authority and difficult to justify as an original proposition. State v. Smith, supra. It is also well settled that one may not enjoy the benefits and privileges of a statute and, after so doing, escape its burdens by asserting its unconstitutionality. Daniels v. Tearney, 102 U. S. 415; Grand Rapids & Indiana Railway Co. v. Osborn, 193 U. S. 17; United States v. Thomas, 195 U. S. 418; Pera v. Village of Shorewood, 176 Wis. 261; 6 R. C. L. 94. It is also a well recognized principle that in order to enable one to attack a statute as unconstitutional one must show that the alleged unconstitutional features of the law injures him and so operates as to deprive him of rights

protected by the constitution. Southern Railway Co. v. King, 217 U. S. 524; Standard Stock Food Co. v. Wright, 225 U. S. 540; Plymouth Coal Co. v. Commonwealth of Pennsylvania, 232 U. S. 531.

The only feature of the Workmen's Compensation Act which affects any individual by the mere force of its enactment is that provision which deprives employers of the defenses of assumption of risk and the contributory negligence and the negligence of a fellow servant. That these court-made defenses may be abolished by the legislature we think has never been seriously questioned. At any rate, that the legislature has such power was distinctly held in Borgnis v. Falk Company, 147 Wis. 327. That the abolition of these defenses as to those who did not accept the provisions of the compensation act, while preserving them to those employers who did accept the provisions constitutes legitimate classification, was also distinctly held in Borgnis v. Falk, supra. So that insofar as the Workmen's Compensation Act has a mandatory effect, its constitutionality has been [fols. 126 & 127] affirmed by this court. It deprives no one of any rights protected by the constitution, nor does it affect them in any manner whatever unless they elect to accept its provisions, and having elected to accept its provisions they are finally estopped from challenging its constitutionality upon both reason and authority. It does not take property without due process of law. It takes property only by acquiescence and consent of the individual, as in the absence of the acceptance by the individual of the provisions of the law it affects him not at all.

The law presents an entire scheme for compensating industrial accidents, and he who accepts the law accepts it in its entirety. Along with its benefits he takes its burdens. In order to avail himself of the rates of compensation therein provided, he submits the determination of facts with reference to all disputes between employers and employes where compensation is claimed, to the Industrial Commission, and waives any further judicial review than that provided for in the act itself. Until the appellant Booth Fisheries Company elected to come under the provisions of this act the law meant no more to it than that of a foreign jurisdiction. It was in no manner concerned with this provision for a judicial review of the findings of the Industrial Commission. Having voluntarily submitted itself to the provisions of the act, it must take them as the legislature enacted them, and it cannot be heard to challenge any part of the law.

By the Court: Judgment affirmed.

[fols. 128 & 129] IN SUPREME COURT OF WISCONSIN

[Title omitted]

REMITTITUR—Filed Jan. 23, 1925

This cause came on to be heard on appeal from the judgment of the Circuit Court of Dane County and was argued by counsel. On

consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Dane County, in this cause be and the same is hereby, affirmed.

STATE OF WISCONSIN, ss:

SUPREME COURT

I, Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original order and judgment of the Court in the above entitled cause, and that it is a correct transcript therefrom, and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Madison, this 17th day of December, A. D. 1924.

Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin. (Seal Supreme Court of Wisconsin.)

[File endorsement omitted.]

[fol. 130] And afterwards, to-wit, on the 23rd day of January, A. D. 1925, pursuant to the order of the Circuit Court of Dane County, the record was transmitted to this Court.

[fol. 131] IN SUPREME COURT OF WISCONSIN

[Title omitted]

CLERK'S CERTIFICATE

I, Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office with all things concerning the same in the above entitled cause.

That the original writ of error, the petition therefor and order allowing the same, the citation with its service endorsed thereon, the assignment of errors, certificate of lodgment and a copy of the bond are appended to the return herein, and that they are all returned to the Supreme Court of the United States in obedience to the command of the writ of error hereto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Madison, this 18th day of February, A. D. 1925.

Arthur A. McLeod, Clerk of Supreme Court, Wisconsin. (Seal of the Supreme Court of Wisconsin.)

[fol. 132] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO PARTS OF RECORD TO BE PRINTED—Filed April 24, 1925

It is stipulated and agreed by and between George A. Schneider, counsel for plaintiffs in error, and Winfield W. Gilman, counsel for defendants in error, that in order to save expense in the printing of the record herein, the following portions of the record, the same being sufficient to show the errors complained of, shall be printed, and no more, to-wit:

Petition for Writ of Error .....Pages 1, 2, 3, 4 of Record.
Writ of Error .....Pages 6, 7 of Record.
Return to Writ of Error .....Page 6 of Record.
Order allowing Writ of Error executed by A. J. Vinje, Chief Justice Supreme Court of Wisconsin .....Page 9 of Record.
And approval of H. C. Hale, Clerk U. S. District Court. Citation to Industrial Commission of Wisconsin and Mary McLaughlin .....Page 11 of Record.
[fol. 133] Acknowledgement of service of Citation by Attorneys for Industrial Commission of Wisconsin .....Page 13 of Record.
Acknowledgement of service of citation by attorneys for Mary McLaughlin.....Page 15 of Record.
Certificate of Lodgment by Arthur A. McLeod, Clerk of Supreme Court of Wisconsin .....Page 17 of Record.
Bond of Booth Fisheries Company .....Page- 19, 20 of Record.
Bond of Zurich General Accident & Liability Insurance Company, Ltd., a corporation .....Pages 23, 25 of Record.
Assignment of Errors and prayer for reversal .....Pages 28, 29, 30 of Record.
Placita and Notice of Appeal .....Pages 32, 33, 34 of Record.
Complaint to review findings and Award of Industrial Commission .....Pages 37, 38, 39 of Record.
Answer of Industrial Commission to complaint .....Pages 41, 42 of Record.
Application for Adjustment of Claim filed by Mary McLaughlin .....Page 47 of Record.
Findings of fact and award by Industrial Commission dated January 20, 1923...Pages 58, 59 of Record.
Directions for judgment filed in Circuit Court of Dane County of State of Wisconsin .....Pages 104, 105 of Record.

Transcript of Evidence taken before Commission ..... Pages 84-103 both inclusive of Record.

Order of Circuit Court of Dane County confirming award of Industrial Commission, dated December 28, 1923 ..... Pages 107, 108 of Record.

Certificate of Clerk of Circuit Court of Dane County transmitting records to Supreme Court of Wisconsin, dated March 7, 1924 ..... Page 115 of Record.

Order of Supreme Court of Wisconsin dated November 11, 1924, affirming the judgment of the Circuit Court of Dane County ..... Page 119 of Record.

Opinion of Supreme Court of Wisconsin .. Pages 121 to 126 both inclusive of Record.

Certificate of Arthur A. McLeod, Clerk of Supreme Court of Wisconsin as to authenticity of order and opinion of Supreme Court of Wisconsin ..... Page 128 of Record.

[fol. 134] Certificate of Arthur A. McLeod, Clerk of Supreme Court of Wisconsin as to return in obedience to Writ of Error ..... Page 131 of Record.

It is further stipulated and agreed that if from oversight or omission any necessary part of the record be not thus printed, that the plaintiffs in error have the right to print, or may be required by defendants in error to print, any further or additional portions thereof.

Dated April 14th, 1925.

George A. Schneider, Counsel for Plaintiffs in Error. Herman L. Ekern, Attorney General of Wis.; Winfield W. Gilman, Counsel for Defendant in Error State of Wisconsin.

[fol. 135] [File endorsement omitted.]

Endorsed on cover: File No. 30,949. Wisconsin Supreme Court. Term No. 313. Booth Fisheries Company and Zurich General Accident & Liability Company, Ltd., plaintiffs in error, vs. Industrial Commission of the State of Wisconsin and Mary McLaughlin. Filed March 14, 1925. File No. 30,949.

FILED
APR 21 1926
WM. R. STANSBURY
CLERK

No. 313

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1925.

BOOTH FISHERIES COMPANY and ZURICH GENERAL ACCIDENT & LIABILITY COMPANY, Ltd.,
Plaintiffs in Error,
vs.
INDUSTRIAL COMMISSION OF THE STATE OF WISCONSIN and MARY McLAUGHLIN,
Defendants in Error,

In error to the Supreme Court of the State of Wisconsin.

BRIEF FOR PLAINTIFFS IN ERROR.

GEORGE A. SCHNEIDER,
ATTORNEY FOR PLAINTIFFS IN ERROR.

HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO

(30,949)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1925.

BOOTH FISHERIES COMPANY and ZURICH GENERAL ACCIDENT & LIABILITY COMPANY, Ltd., *Plaintiffs in Error,* *vs.* INDUSTRIAL COMMISSION OF THE STATE OF WISCONSIN and MARY McLAUGHLIN, *Defendants in Error.*	In error to the Supreme Court of the State of Wisconsin.

BRIEF FOR PLAINTIFFS IN ERROR.

To the Honorable Justices of the
Supreme Court of the United States:

MAY IT PLEASE THE COURT:

STATEMENT OF FACTS.

This is a proceeding to review the decision of the Supreme Court of the State of Wisconsin in the case of *Booth Fisheries Company and Zurich General Accident & Liability Insurance Company, Ltd.* v. *Industrial Commission of the State of Wisconsin and Mary McLaughlin,* reported in 185 Wis. 127.

The appeal is bottomed on the proposition that the decision of the Wisconsin Supreme Court violates the due process clause of the Fourteenth Amendment of the Federal Constitution in that it denies parties the right to submit to a judicial tribunal for its determination upon its own independent judgment a review of the facts or evidence.

William McLaughlin, the deceased, was employed by the Booth Fisheries Company in Green Bay as a night watchman. On October 6, 1922, while in the employ of the Booth Fisheries Company, the deceased was taken sick and afterwards on October 19, 1922, died. Constance Huen, a witness, testified that the deceased had worked for the Booth Fisheries Company for eighteen or nineteen years, and that on the evening before the alleged injury he had talked to Mr. McLaughlin and told him that he desired to make deliveries early the next morning, and desired Mr. McLaughlin to feed his horse at 3:00 o'clock in the morning, so that when he arrived he could start out immediately to make the necessary deliveries. (Tr. 14.) Mr. Huen stated that the next morning he arrived at the barns of the respondent's premises, and found that the barn door was locked; that he then went to the fish house door and found that that also was locked. He rapped three or four times upon the door and then went to the window, and saw Mr. McLaughlin lying on a chair behind the stove. He rapped at the window and then Mr. McLaugrlin got up and opened the door. Mr. McLaughlin advised him that he was sick and desired to go home, so that Mr. Huen went to the barn and harnessed the horse, and put some blankets in the wagon. He then put Mr. McLaughlin in the seat of the wagon and took him home and left him at the front door of his home. (Tr. 14.) There were several freezers on the premises and freezer No. 1 was being dried out, so that tools could be kept in it over the winter months. (Tr. 15.) To dry out this freezer a salamander stove was placed in it, and coke was being burned in this salamander on this night. The next day Mr. McLaughlin stated that he had been in freezer No. 1 and after coming out of it, he fell down on his knees on the gangway, and that then he had gone to the office. This freezer No. 1 was about eighteen feet long, eighteen feet wide, and about eight feet high, and there were about twenty holes in the freezer, each about ten inches wide, which could be used as

ventilators, and two of these holes were open at the time. (Tr. 17.) The door of this freezer was unlocked, and it was the duty of Mr. McLaughlin to look into the freezer once in awhile and see that nothing was burning. The morning after Mr. McLaughlin was taken sick the superintendent of the Booth Fisheries Company went into the freezer, at which time the salamander was still burning. He looked at the stove and inspected the freezer at that time, and stayed in the freezer for several minutes without any bad effects. (Tr. 29.)

Mr. McLaughlin was seventy-seven years of age, and before this sickness was unusually lively and appeared in good health. (Tr. 19.)

Dr. E. F. Knox, a practicing physician, was called to the home of the deceased on October 7, 1922, and arrived there at about 6:00 o'clock in the morning. (Tr. 20.) He found an elderly man, very much exhausted and breathing loud and rapidly. He had some diarrhea, vomited and complained of headache. His respiration was thirty, and his pulse was rapid and irregular. His temperature was ninety-eight. His breathing was loud and difficult, and upon examining his chest it was found that there was some tubular breathing throughout his chest in front. (Tr. 21.) His heart was somewhat irregular, rapid and the volume was slightly weak. He did not tell Doctor Knox anything as to what was the cause of his illness. From the history of the case and from the symptoms Doctor Knox figured he had been affected with some accidental poisoning and these symptoms were not inconsistent with monoxide gas poisoning. (Tr. 22.)

Dr. W. H. Bartran testified that he saw Mr. McLaughlin on October 9, 1922, and after that on the 13th of October and again on the 15th day of October. At the times he saw Mr. McLaughlin he was complaining of general weakness and dysentary. Following his death, Doctor Bartran performed an autopsy. He found an emaciated elderly man. The chest

was opened and there was found that on the left side there was no fluid in the pleural cavity and the upper lobe of the left lung was collapsed.

A number of sears of old tubercular lesions were found in the apex, and posteriorly in the lower lobe was an area the size of a large hen's egg with the finding of pneumonia of a number of days' duration. (Tr. 30.) This was afterwards substantiated by microscopical findings.

The right lung was adherent to the external chest wall due to an old adhesion that included the whole pleural cavity on the right side. This was of long duration and probably was originally a tubercular lesion.

The upper lobe was oedematous and there was considerable fluid in it. The lower right lobe contained a large pneumonic mass; there was a large part of this lobe involved with pneumonia which was substantiated by the microscopical examination.

The heart was normal in size; there was a chronic miocarditis, the walls of the heart were very thin. The wall of the right ventricle being extremely thin. The mitral valve had an old valvular lesion and attached to this valve was a thrombus. This thrombus being five and one-half inches long and extending up through the aortic valve into the aorta itself and into the arch of the aorta. The blood was very dark and venous in the vessels and in the tissues of the body. There was a chronic epididymitis of the liver and the liver was slightly hardened and small. The stomach and gall bladder and both the large and small intestines were normal, both the right and left kidneys were small and showed evidence of a nephritis. The post-mortem findings were that he died from pneumonia and uremia from a nephritis complicated with a mitral valve lesion and arteriosclerosis general.

On the post-morten examination, there was no evidence of a carbon monoxide poisoning. In a carbon monoxide pois-

oning, there is a typical condition in the blood caused by uniting of the gas with the hemoglobin of the blood so that the blood can not become oxygenated and this condition gives rise to a very cherry red blood. Anyone who dies from a carbon monoxide poisoning would have this typical condition of the blood. (Tr. 31.) In this case, the deceased had lobar pneumonia. In pneumonia resulting from the inhalation of gas, we find it is the bronchial type that is present and not lobar pneumonia. Without a post mortem it would be impossible to diagnose the cause of death in Mr. McLaughlin's case. (Tr. 32.)

This evidence, we contend, does not establish that the deceased came to his death from carbon monoxide poisoning. It is set out to demonstrate on what kind of evidence an administrative body makes its decision taking the property of an individual. The Supreme Court held that under the law and the decisions of the Court, it did not have the power to review the evidence to determine its preponderance.

On this evidence, the Commission entered an award in favor of Mary McLaughlin, the widow, for $4,300, from which decision, the various appeals have been prayed by the plaintiffs in error.

Constitutional Provisions Involved:

Article XIV United States Constitution:

> "Sec. 1. * * * nor shall any state deprive any person of life, liberty or property without due process of law. * * *"

Statute Involved:

> "Section 102-23. 1, The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive; and the order or award, either interlocutory or final, whether judgment has been ren-

dered thereon or not, shall be subject to review only in the manner and upon the ground following. * * * Upon such hearing, the Court may confirm or set aside such order or award; and any judgment which may theretofore have been rendered thereon; but the same shall be set aside only upon the following grounds:

(1) That the commission acted without or in excess of its powers.

(2) That the order or award was procured by fraud.

(3) That the findings of fact by the commission do not support the order or award." (Wisconsin Statutes, 1921.)

The judgment entered by the Supreme Court of Wisconsin affirming the judgment of the Circuit Court of Dane County bears date November 11, 1924. (Tr. 41, 45, 46.)

The due process clause of the fourteenth amendment of the Federal Constitution was drawn into question before the Circuit Court of Dane County. (Tr. 39.)

The same clause was drawn into question in the Supreme Court of Wisconsin. (Tr. 43.)

The assignment of errors also draws the same clause into question. (Tr. 6, 7.)

Error is assigned that the Supreme Court of Wisconsin erred in holding that Section 102.23 of the Wisconsin Statutes did not violate Article XIV, Section 1 of the United States Constitution.

POINTS AND AUTHORITIES.

I.

As clearly indicated by the language used in the Fourteenth Amendment of the Federal Constitution, "nor shall any state deprive any person of life, liberty or property without due process of law," constitutes a limitation on the powers of the states.

Holden v. *Hardy*, 159 U. S. 366.
Hallinger v. *Davis*, 146 U. S. 314.
Nashville Railway Company v. *Alabama*, 128 U. S. 96.
Kelley v. *Pittsburg*, 104 U. S. 78.
Munn v. *Illinois*, 94 U. S. 113.
U. S. v. *Cruikshank*, 92 U. S. 542.

II.

The term, due process of law, means a law prescribed and enforced in accordance with certain fundamental principles for the protection of private rights which our system of jurisprudence has always recognized.

Hurtado v. *California*, 110 U. S. 516.

III.

That a person shall not be deprived of life, liberty or property without an opportunity to be heard in defense of his right, is a rule founded on the first principles of natural justice, and is older than the written constitution. This rule is the foundation of the constitutional guarantees of due process of law.

Munn v. *Ill.* 94 U. S. 113, 123.

IV.

Due process of law in each particular case means such an exertion of the power of government as the settled maximums of law permit and sanction and under such safeguards for the protection of individual rights as though maxims prescribed for the class of cases to which the one in question belongs.

Cooley, Const. Limitations, Sec. 356.
Chicago R. Co. v. *Chicago,* 166 U. S. 226, 240.

V.

A state can not, however, make anything due process of law, which by its own legislation it may choose to declare such. To affiffirm this would be to hold that the prohibition contained in the Fourteenth Amendment is of no avail, or that it has no application when the invasion of private rights is effected under the forms of state legislation. It is not to be supposed that its legislative powers are absolute and despotic and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint.

5 U. S. Enc. 627.
Murray v. *Hoboken,* 18 How. 272, 276.
Davidson v. *New Orleans,* 96 U. S. 97, 102.
Hurtado v. *California,* 110 U. S. 516, 535.
Chicago R. Co. v. *Chicago,* 166 U. S. 226, 235.
Holden v. *Hardy,* 159 U. S. 366, 389.
Smith v. *Ames,* 169 U. S. 464, 527, 528.
Fayerweather v. *Ritch,* 195 U. S. 276, 297.
Coppage v. *Kansas,* 236 U. S. 1.
Butler v. *Perry,* 240 U. S. 328.
New York v. *Gitlow,* 268 U. S. 265.
6 Ruling Case Law 443.

VI.

The provisions of the Workmen's Compensation Act of Wisconsin that the findings of fact made by the Commission, acting within its powers shall, in the absence of fraud, be conclusive which in effect prohibits the Court from reviewing the facts is contrary to the due process clause of the Fourteenth Amendment of the Federal Constitution.

Ohio Valley Water Co. v. *Ben Avon Borough,* 253 U. S. 287.

Bluefield v. *Public Service Com.,* 262 U. S. 679.

Coppage v. *Kansas,* 236 U. S. 1.

Burton v. *Perry,* 240 U. S. 328.

5 Enc. U. S. Sup. Ct. Rep. 629.

2 Kent's Comm. 13, quoted with approval in *Hurtado* v. *Cal.,* 110 U. S. 516, 527.

Davidson v. *New Orleans,* 96 U. S. 97, 102, 105.

Walker v. *Sauvinet,* 92 U. S. 90, 93.

Kennard v. *Louisiana,* 92 U. S. 480, 481.

Missouri v. *Lewis,* 101 U. S. 22, 30.

Ex parte Wall, 107 U. S. 265, 288, 290.

C. B. & Q. Ry. Co. v. *Chicago,* 166 U. S. 226, 240.

Murray's Leases v. *Hoboken Land Co.,* 18 Howard 272, 276.

5 Enc. U. S. Supreme Court Rep. 511.

Twining v. *New Jersey,* 211 U. S. 78, 100.

Tenure of Office of Judicial Department, Federalist No. 78.

Federalist Nos. 47, 78, 79, 80, 81.

A. Lawrence Lowell, "The Government of England," Vol. II, pp. 471, 487; Vol. I, p. 15.

Oklahoma Operating Co. v. *Love,* 252 U. S. 331, 335.

Georgia Banking Co. v. *Smith,* 128 U. S. 174, 180.

Dobbins v. *Los Angeles,* 195 U. S. 223, 235.

Hagar v. *Reclamation District,* 111 U. S. 701, 708.

Carson v. *Brockton,* 182 U. S. 398, 402.
Wong Wing v. *United States,* 163 U. S. 228, 237.
Interstate Commerce Commission v. *Brinson,* 154 U. S. 447, 478.
Li Sing v. *United States,* 180 U. S. 486, 495.
Hawkins v. *Bleakly,* 243 U. S. 211.
6 Ruling Case Law 443.

ARGUMENT.

There are two phases of construction involved in this case:

1. Article XIV of the Federal Constitution, which is a limitation on the power of the State to deprive any person of property without due process of law.

2. Section 102.23 of the Workmen's Compensation Act of Wisconsin, which provides that the Court may set aside the decision of the Industrial Commission only upon the following grounds:

(*a*) That the Commission acted without or in excess of its powers.

(*b*) That the order or award was procured by fraud.

(*c*) That the findings of fact by the Commission do not support the order or award.

It is our contention that the construction placed upon Section 102.23 of the Workmen's Compensation Act of Wisconsin which places it beyond the power of the Court to review the facts in the case appealed from the Industrial Commission, prescribes a rule governing judicial action, and in denying the right of the Court to pass upon the preponderance of the evidence, it violates the due process clause of the Fourteenth Amendment.

This section, if it means what has been claimed for it, gives the Industrial Commission the right to decide a question of fact without being subject to a review by a court of their action in so doing. If the Court can not review the decision of the Industrial Commission on the question of the weight of the evidence, what is to prevent the Court from finding that an award may be made by the Commission though not supported either by evidence or credible evidence.

To sustain an award where there is neither evidence nor credible evidence, would be tantamount to holding that a commission could deprive a party of property without due process of law.

If, in the teeth of the Fourteenth Amendment of the Federal Constitution, the interpretation of the Wisconsin Supreme Court is correct, it would permit of a construction of the Act allowing the decisions of the Commission to be based upon a lesser quantum of evidence than the weight thereof. Thus the rights of the individual citizen would rest entirely in the favor or discretion of that particular member of the Commission who might happen to pass upon this case. The Wisconsin law does not require the members of the Commission to be jurists or lawyers; it does not require training in weighing the facts affecting the rights of the individual citizen. It is, therefore, more imperative that their actions be subject to judicial review in all phases than if the law required them to be trained men skilled in the weighing of facts and interpreting of evidence. A mere statement of this principle is sufficient to demonstrate this truthfulness. As was said by the author of "Constitutional Law," in 6 Ruling Case Law, page 443:

> "It has been authoritatively stated that the right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion, and there are many instances of statutes being held unconstitutional on the ground that they vested an arbitrary power and discretion over matters protected by the Constitution."

In the opinon delivered by the Supreme Court of Wisconsin in the case at bar, it was pointed out that the Workmen's Compensation Act of Wisconsin creates an administrative board to carry its provisions into effect, and divides all private employers into two classes; those who elect to come under the law, and those who do not so elect.

We have pointed out the fact that the Industrial Commission of Wisconsin is an administrative body, in order to dis-

tinguish it from those boards or commission, which are considered judicial bodies, and to point out that the Wisconsin Commission does not exercise judicial functions. Therefore, the parties, to a proceeding before the Industrial Commission of Wisconsin are deprived of a judicial inquiry into the facts of the case and because of the denial of the right of determination by a judicial tribunal upon its own independent judgment as to the preponderance of the evidence taken or heard by the Commission according to the settled rules governing judicial action and decision, the parties are denied due process of law.

This brings us to the application of the doctrine laid down by this Court in the case of *Ohio Valley Water Company* v. *Ben Avon Borough*, 253 U. S. 287. In this case the legislature had provided that the determination of a question of fact by the Utilities Commission could not be reviewed by a court.

Mr. Justice McReynolds in the opinion says:

> "Looking at the entire opinion, we are compelled to conclude that the Supreme Court interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment when the action of the commission comes to be considered on appeal.
>
> The order here involved prescribed a complete schedule of maximum future rates, and was legislative in character. In all such cases, if the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment. * * *
>
> Without doubt the duties of the courts upon appeals under the Act are judicial in character not legislative. This is not disputed, but their jurisdiction as ruled by the Supreme Court stops short of what must be plainly intrusted to some court in order that there may be due process of law.

> Plaintiff in error has not had proper opportunity for an adequate judicial hearing as to confiscation, and unless such an opportunity is now available and can be definitely indicated by the court below in the exercise of its power finally to construe laws of the State, the challenged order is invalid."

This question also received the consideration of this Court in the case of *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, 64 L. Ed. 596. In the opinion the Court says:

> "'The order of the commission prohibiting the company from charging, without its permission, rates higher than those prevailing in 1913, in effect prescribed maximum rates for the service. It was, therefore, a legislative order, and under the Fourteenth Amendment, plaintiff was entitled to an opportunity for a review in the courts of its contention that the rates were not compensatory. The Constitution of the State prohibited any of its courts from reviewing any action of the Commission within its authority except by way of appeal to the Supreme Court, and the Supreme Court has construed the Constitution an applicable provision of the statute as not permitting a direct appeal from orders fixing rates. On behalf of the Commission it was urged in the oral argument that a judicial review of the order fixing rates might have been had also by writ of mandamus, or prohibition issuing out of the Supreme Court of the State. But in view of the provision of the State Constitution just referred to, it must be assumed, in the absence of a decision of the State court to the contrary, that neither remedy, even if otherwise available, could be used to review an order alleged to be void because confiscatory."

A similar rule was laid down by this Court in the case of *Bluefield Co.* v. *Public Service Com.*, 262 U. S. 679; 67 L. Ed. 1176.

We contend that the above cases are authority for the proposition that, if the Industrial Commission of Wisconsin is an administrative board, the rule hereinabove enunciated by this Court applies, and justifies holding that unless the Court reviews the facts upon an appeal from the Industrial Commis-

sion that the parties are denied due process of law as set forth in the Fourteenth Amendment of the Federal Constitution.

The opinion of the Supreme Court of Wisconsin, in which the Court sustained the ruling of the *nisi prius* Court that an independent judgment did not have to be expressed by a judicial tribunal as to the weight of the evidence is bottomed entirely on the proposition that the Wisconsin Workmen's Compensation Act is elective and that the plaintiff in error having elected to operate under the Act is therefore precluded from raising the constitutional question.

It is within the range of possibility, that, under the rule of this Court in *New York Central R. R.* v. *White*, 243 U. S. 188, *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, due process might not require a review by a judicial tribunal where the Compensation Act is an exercise of the police power by the State as pointed out in those two cases and other decisions following same.

The Wisconsin Act, however, is elective and not an exercise of the police power and is similar to the Iowa Act considered by this Court in *Hawkins* v. *Bleakly*, 243 U. S. 211. In discussing due process in this case, this Court pointed out at page 215:

> " 'Appeal is provided from the decree enforcing the award on which all save pure questions of fact may be reviewed. * * * We hold that though this Act does not in terms provide for judicial review, except by said appeal, the statute does not take from the court all jurisdiction in the premises. * * * We are in no doubt that the very structure of the law of the land, and the inherent power of the courts, would enable them to interfere, if what we have defined to be the jurisdiction conferred upon the arbitration committee were by it exceeded—could inquire whether the Act was being enforced against one who had rejected it (page 216), whether the claiming employee was an employe, whether he was injured at all, whether his injury was one arising out of such employment, whether it was due to intoxication, or self-inflicted, or

> acceptance being conceded, into whether an award different from the statute schedules had been made, into whether the award were tainted with fraud on the part of the prevailing party, or of the arbitration committee, and into whether that body attempted judicial functions in violation of or not granted by the Act.' Thus it will be seen that the Act prescribes the measure of compensation and the circumstances under which it is to be made, and establishes administrative machinery for applying the statutory measure to the facts of each particular care; provides for a hearing before an administrative tribunal, and for a judicial review upon all fundamental and jurisdictional questions. This disposes of the contention that the administrative body is clothed with an arbitrary and unbridled discretion inconsistent with a proper conception of due process of law. *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, 545."

The Wisconsin Supreme Court in the case at bar in its opinion reported 185 Wis. 127, does not concede any of the powers in the Courts that are conceded by the Iowa Supreme Court in *Hawkins* v. *Bleakly,* 154 N. W. 1064.

This Court points out in its opinion that the Iowa Court admits that the Act provides for a judicial review upon all fundamental and jurisdictional questions and concludes that these provisions are consistent with a proper conception of due process of law.

We do not deem it necessary to analyze at this time the decisions cited in points and authorities I-V, because this case resolves itself into a question dependent upon the application of the rule laid down in the case of *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287, and similar decisions. We also draw upon the rule laid down in the case of *Hawkins* v. *Bleakly,* 243 U. S. 211.

It is our contention that the election by an employer to operate under the Workmen's Compensation Act of Wisconsin can not be construed as a waiver of his rights under the Fourteenth Amendment. To argue that the election to oper-

ate under the Act in question waives his rights under the Fourteenth Amendment and to a review of the facts by an independent judicial tribunal is begging the question.

Logically, the argument could have been advanced that a Public Utility Company, doing business in a State, where a Public Utilities Act provides that the decision of the Public Utilities Commission shall be conclusive on questions of fact and shall not be reviewable by the Courts, had elected to be bound by that provision of the statute and that it could not thereafter urge that the due process clause of the Fourteenth Amendment had been violated.

We intend to point out that the due process clause of the Fourteenth Amendment is applicable to the case at bar and that the denial of a review of the facts by a judicial tribunal violates the constitutional limitation.

Our position that the provision of the Workmen's Compensation Act of Wisconsin violates the due process clause of the Federal Constitution rests, as already stated, fundamentally upon the doctrine announced by the Supreme Court of the United States in *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287. The doctrine announced in that case is to the effect that property rights, when in issue can not be determined by a commission. If the original hearing is before a commission, and the evidence then taken, in any event, there must be a "fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment." (*Ibid* 289.)

This case clearly decides a question not before passed upon. As the citations in the opinion of the Court show, it previously had been well established that a hearing before a commission did not satisfy the due process clause. In every such case, there is a right to a court review. What was new in the Ohio Valley decision was the determination of the

scope of the court review necessary to constitute due process —the holding that there must be "a determination upon its own independent judgment as to both law and facts." There was no claim by the water company that it had not had a fair and complete hearing before the Commission, and to satisfy ourselves that no such claim could have been made, we need to refer only to a statement of the character of that hearing, which is set forth fully only in the dissenting opinion of Mr. Justice Brandeis, from which it appears that the Commission's order was entered in a proceeding commenced upon due notice, conducted according to judicial practice and participated in throughout by the company (*Ibid* 293). The decision of the Court, then, is that a hearing before a Commission, unobjectionable in every way, does not constitute due process, without a right of independent determination by a court. To comply with this requirement, there must be a right to a hearing in which the question shall be determined according to the law of the land by a judicial tribunal.

This decision seems so directly in point in our case, that there seems no possibility of distinguishing it; yet, in order to be sure that our case comes within the rule, it may be necessary to consider the extent of the rule; and, for that purpose, to consider the reason for the rule. The Court in the *Ohio Valley Water Co. case* assumes the rule as too well settled for argument, and does not discuss the reasons.

Now, it is certain that not every question that arises necessarily need be decided by a court. There are questions that may be decided by other branches of the Government; and, provided their decisions are made after fair procedure, and are not entirely unsupported by reason, they are final.

> "Though due process of law implies and includes actor, *res, judex,* regular allegations, opportunity to answer and trial according to some settled course of judicial proceedings, yet this is not universally true. Under the law of England after Magna Charta, and as it was acted

on here, there were cases in which process, in its nature final, issued against the body, lands and goods without any such trial. It was not the purpose of the due process clauses of the Constitution to overturn this practice and it follows that while generally both public and private wrongs are redressed through judicial actions, there are more summary extra judicial remedies for both, in which the decisions of executive or administrative officers, acting within powers expressly conferred, are due process of law. * * * There is no provision in the Federal Constitution which forbids a state from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question." 5 Enc. U. S. Supreme Court Rep. 629.

But this rule permitting determinations by a non-judicial body, is exceptional and recognized only under the police power. Due process has reference to judicial proceedings as is indicated in the cases hereinafter cited.

> "The better and larger definition of 'due process of law' is that it means law in its regular course of administration through courts of justice." 2 Kent's Commentaries 13; quoted with approval, *Hurtado* v. *California*, 110 U. S. 516, 527.

This idea of a trial in a "court of justice" runs all through the federal authorities.

Davidson v. *New Orleans*, 96 U. S. 97, 102, 105.
Walker v. *Savinet*, 92 U. S. 90, 93.
Kennard v. *Louisiana*, 92 U. S. 480, 481.
Missouri v. *Lewis*, 101 U. S. 22, 30.
Ex parte Wall., 107 U. S. 265, 28, 290.
C. B. & Q. Ry. v. *Chicago*, 166 U. S. 226, 240.

It is well established then, that there is the rule that a person is constitutionally entitled to have his rights determined by a duly constituted court.

The words "due process of law" mean the same as "by the law of the land."

Murray's Leases v. *Hoboken Land Co.*, 18 Howard 272, 276.

The rule of decision announced in the foregoing case has remained the law from that day to this.

5 Enc. U. S. Supreme Court Rep. 511.

Twining v. *New Jersey,* 211 U. S. 78, 100.

The history of our English ancestors, which is also ours, is largely the history of a struggle to have their rights determined by an independent judiciary. The history is too well known to require lengthy restatement here. The first outstanding landmark was the thirty-ninth paragraph of Magna Charta:

> "No free man shall be taken or imprisoned, or disseized, or outlawed, or banished, or anyways destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land."

This provision of the Magna Charta, although it may have produced very little effect at the time, was never forgotten, and the struggle for freedom was a struggle to make it effective, and it was made fully effective at the time of the revolution in 1688. There was passed the Bill of Rights, the Habeas Corpus Act and other measures placing these rights within the protection of the courts; but even that would have been of little avail without the crowning achievement of the revolution—the Act of Settlement that made the judges independent.

To us, as to our ancestors, "law" means a rule that is enforced by the regular courts.

The vital necessity that our rights should be protected by an independent judiciary was everywhere accepted at the time the Constitution was adopted, and was iterated and reiterated in the Federalist. (See Nos. 47, 78-81.)

> "There is no liberty, if the power of judging be not separated from the legislative and executive powers. Tenure of Office of Judicial Department," Federalist No. 78.

We feel that this proposition that the right to a hearing in court is one of the foundation stones of our system of government and can not be too strongly emphasized. We desire to quote somewhat at length from an eminent writer upon the subject.

We quote from Lowell's work, Volume II, page 471, passim:

"Law has played in many ways an unusually prominent part throughout the course of English history. First, among the modern states of Europe to emerge from the confusion of the early middle ages, England solidified as a nation during the period when a legal tone of thought was dominant. The foundation of her institutions was laid at that time, and they assumed more and more completely a legal form. Herein seems to have lain the real significance of Magna Charta 'for in brief it meant this, that the King is and shall be below the law.' The Charter has, indeed, been regarded as the turning point from the feudal state, universal in northwestern Europe, to the limited monarchy peculiar to England; and although it is not the sole example of a document of that kind in the middle ages, it was followed in England, as in no other country, by the construction of legal machinery restricting permanently the royal power. King and Parliament came to express their will in formal statutes, which the national courts interpreted and enforced together with the Common Law evolved from their own decisions. Personal liberty, moreover, was based upon law, and for the most part not upon privileges of particular classes or places, but upon principles of universal application protected by the courts. All public life had, therefore, a legal tinge, which went so deep that it did not by any means wholly disappear when the transformation from medieval to modern conditions called for the masterful hand of a strong government. It survived in England when other states of Europe went through an era of autocratic rule; and after the discords of the seventeenth century had passed away it regained its hold upon the mind of the nation. In seeking to fortify their political claims, men searched precedents rather than abstract principles, and law resumed its place as the cornerstone of English public life.

This historic position of the royal courts of justice has affected profoundly the English conception of law,

and this has in turn influenced for the course of legislation and the authority of the courts themselves. To English speaking people, whether lawyers or not, law means a body of rules enforced by the courts. For this purpose it is unimportant whether the function of the function of the courts be regarded as making or declaring law, because the question is not about the source or origin, but simply about the criterion of law. Such a definition of law is commonly assumed as an axiom, and yet it is neither universally accepted in all countries, nor has it always been applicable even in England. One may be pardoned, therefore, for examining it in a very cursory way in relation to its historical developments, its philosophical results, and its practical effects.

The idea that English law is a body of rules enforced by the national courts may be traced to the centralizing power of the Norman and Angevin kings, which was brought to bear upon the whole community mainly through their central courts of justice and their itinerant judges. These supplanted the local and feudal courts, and build up the conception of a Common Law for the whole realm, administered upon fixed principles by regular permanent tribunals. But it was long before men felt that all law must be so administered; that there could be no law outside of that enforced by the regular courts. The crown was still the fountain of justice, and the source had not yet run dry. Petitions were made both to the crown, and in early times to Parliament, complaining of wrongs which the courts did not reach, and in such cases redress could be given in accordance with the general principles of justice. In civil cases petitions to the crown came to be habitually referred to the Chancellor, who in dealing with them wrought out the rules of equity. Criminal tribunals also emanated from the reserved justice of the crown in counsel. Such were the Star Chamber and the Court of High Commission; but under the early Stuarts these bodies were used for political and ecclesiastical objects to such an extent that, by casting discredit upon all extraordinary tribunals, they brought about the next step in the English conception of law.

The doctrine that there is no law save what is enforced by the regular courts resulted from the strife that filled the first half of the seventeenth century; and it involved

a life and death struggle between the Civil and the Common Law, for the extraordinary tribunals were deeply impregnated with the principles of the Civil Law. It began with a conflict of jurisdiction over the right of the Common Law courts to issue writs of prohibition restraining the action of the extraordinary tribunals, Coke being the great champion of the former. It culminated in the Act of 1640, which abolished the Star Chamber with the other courts exercising similar powers, and forbade the Privy Council or its members to exercise jurisdiction in English civil suits. This movement swept away all tribunals that had not firmly established their standing as regular courts. Even the Court of Requests, commonly called the Poor Man's Court, disappeared in the commotion of the times.

From the period of the Restoration the principle that law is the body of rules enforced by the ordinary courts may be regarded as definitely settled. For a time, indeed, the resort to extraordinary tribunals is replaced by an effort to use the regular judicial machinery for political purposes. But this in turn was checked in various ways, one of them being the penal action under the Habeas Corpus Act of 1679, which effectually prevented arbitrary imprisonment; and another the provision in the Settlement Act giving the judges a tenure during good behavior, which secured their freedom from political control. Thereafter, the growth in the art of legislation, and the greater harmony between the Crown and the Houses lessened the temptation on the part of the government to use courts of law as instruments for social or political objects. If a grievance was felt, if a change was wanted, if an obstacle blocked the way, the result desired could easily be brought about by a statute which was immediately enforced by the courts as a part of the law of the land. Thus in the eighteenth century the principle that law is that which is enforced by the courts thrived undisturbed, and attained its full maturity."

From page 487, *Ibid*, we quote:

"The English conception has, perhaps, never been put in a more striking way than by Hume, in his essay on the origin of Government: 'Man, born in a family,' he says, is 'compelled to maintain society from necessity

> from natural inclination and from habit. The same creature, in his farther progress, is engaged to establish political society, in order to administer justice; without which there can be no peace among them, nor safety, nor mutual intercourse. We are, therefore, to look upon all the vast apparatus of our government, as having ultimately no other object or purpose by the distribution of justice or, in other words, the support of the twelve judges. Kings and parliaments, fleets and armies, officers of the court and revenue, ambassadors, ministers and privy counsellors, are all subordinate in their end to this part of administration.' "

In *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287, it was pointed out that the rule that a party is entitled to a hearing in a court of law—that this is demanded by the due process clause—was too well settled to permit of argument. In a prior case (*Oklahoma Operating Co.* v. *Love,* 252 U. S. 331, 335), this Court had handed down a similar opinion. In the *Water Company case,* the controversy was as to the scope that this review should have. Must the Court exercise its own independent judgment upon the valuation to be placed upon the company's property? Or, on the other hand, was the intervention of the Court to be confined to merely formal matters—to the question whether the proceedings before the Commission were according to law? This was the nub of the whole matter, and the decision depended upon the answer to the question: "What is the nature of the controversy? Was it legislative or judicial?" If the question of calculation was legislative in its nature; then, unless there was an entire absence of any grounds upon which the Commission could act, its decision would be final. Courts can not hold legislation invalid merely because they may differ with the judgment of the legislative body, and consider its decision unwise. They can not interfere unless the legislation is purely arbitrary, and without any reasonable foundation.

Dobbins v. *Los Angeles,* 195 U. S. 223, 225.

Whether the fixing of a valuation was a legislative question then must be answered. That, within limits, the fixing of rates is a legislative question admits of no doubt. Equally, without doubt, is it that the rates must be at least sufficient to give a fair return on the investment, and the answer to this last, and more narrow, question is purely judicial.

It is for the legislature to decide whether the expanding of the services of a public utility is not demanded by the public interest, and whether, to that end, and to encourage investments in such enterprises, and the incurring of financial risks in experiments and new departures, an income in excess of the ordinary market rate may not be in furtherance of the public benefit. With such questions, the courts have nothing to do. The legislative determination is final. It may be such as to paralyze progress in the industry and prevent any advance. Investors may be unwilling to take any risk, to engage in any enterprise the outcome of which is at all doubtful; though, if tempted by the possibility of an increased income, they might undertake enterprises that hold forth every promise of immense benefit to the people at large. The legislation may be such as to produce these results, and yet the courts can not interfere. If, however, we come to the question whether the rates allow a fair return on the investment, whether they conform to the minimum standard that the investor must be allowed, if he can, to get at least the market rate of interest on his investment, then we have a purely judicial matter; and the question of the amount of the investment, upon which the answer rests, is necessarily judicial. No legislation can make an investment only $900,000, when as a matter of fact it is $1,330,000. An act of the legislature can not make John Smith twenty-one years of age if, as a matter of fact, he is twenty.

Again, the reasons for the distinction are historical. The legislature, within limits, has always exercised the power to regulate public utilities.

> "This is not a new doctrine but old doctrine, always asserted whenever property or business is by reason of special privilege received from the government, the better to secure the purposes to which the property is dedicated or devoted, affected with a public use." *Georgia Banking Co.* v. *Smith*, 128 U. S. 174, 180.

The regulation of innkeepers and common carriers can be traced far back in the history of the common law.

On the other hand, undoubtedly where life and liberty were involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also where title or possession of property is involved.

> *Hagar* v. *Reclamation District*, 111 U. S. 701, 708.
> *Carson* v. *Brockton*, 182 U. S. 398, 402.

> "We regard it as settled by our previous decisions that the United States can, as a matter of public policy, by Congressional enactment, forbid aliens or classes of aliens from their territory, and can, in order to make effectual such decree of exclusion or expulsion, devolve the power and duty of identifying and arresting the persons included in such decree and causing their deportation, upon executive or subordinate officials.
>
> But when Congress tries further to promote such policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property we think such legislation to be valid, must provide for a judicial trial to establish the guilt of the accused.
>
> It is not consistent with the theory of our government that the legislature should, after having defined the offence of an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents." *Wong Wing* v. *United States*, 163 U. S. 228, 237. *Li Sing* v. *United States*, 180 U. S. 486, 495.

Neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses, or can be invested with a general power of making inquiry into these private affairs of the citizens.

Now, the citation of authorities to the effect that the determination of rights of property by an administrative officer is not due process could be extended indefinitely; but we would not be able to find a single case involving an attempted determination of private property rights, involving purely a demand by one private citizen.

So far as we know, never, until these compensation acts were enacted, was an attempt ever made to vest such power in an administrative officer. When our states, one after another, rapidly introduced the compensation system, they tried to follow, in its main outlines, the English system, and they adopted the form, not the substance, of the English procedure. But it must never be forgotten that the Arbitrator of the English Acts is the county Judge. Nothing is more misleading than to look to the form or theory, rather than the substance, of English institutions.

The doctrine adopted by the legislatures in the various states that commissions shall determine the dispute between the employer and the employee is an engraftment of the continental system. If the method adopted in these acts is to be followed and extended, where are we to place a limit upon it? All property rights may be regulated by statute, and their determination vested in the administration, so that in the end a man must look, for his rights, not to a judgment of a court of law, but to the decree of a bureaucrat.

It may be—it has been suggested—that there is no difference. That if the administrative officer gives notice and conducts a hearing fairly and without favor, that is all that can be demanded. It is said that the officer is as much bound by law, and presumptively will conform to it as loyally as a court.

Yes, but our experience has shown us that this is not so. We have seen the executive and legislature alike making little or no attempt to keep within the law. We have seen them going just as far as the courts will let them and often making an experiment to see how far they would be allowed to go.

Thus it appears doubtful whether this Court under the rule laid down in *New York Central R. R. Co.* v. *White*, 243 U. S. 188, and *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, where the Workmen's Compensation Acts discussed, were admittedly an exercise of the police power of the state, the inherent undefined power of the state, called the police power might extend the rule so as to give the legislature power to deprive the individual of a submission of the controversy to a judicial tribunal for determination upon its own independent judgment. But, such is not the question in the case at bar, for the Supreme Court of Wisconsin does not base its decision on an exercise of the police power and in this respect the case at bar may be susceptible to the same construction placed upon the Workmen's Compensation Act of the State of Iowa in the case of *Hawkins* v. *Bleakly*, 243 U. S. 211.

It must follow, therefore, that, upon the authority of *Hawkins* v. *Bleakly*, 243 U. S. 211, and *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287, the provisions contained in Section 102.23 of the Workmen's Compensation Act in force in Wisconsin in the light of the judicial construction placed upon it, violates the due process clause of the Fourteenth Amendment.

For the reasons stated, we submit that the judgment of the Supreme Court of Wisconsin be reversed.

Respectfully submitted,

GEORGE A. SCHNEIDER,

Of Chicago, Illinois,

Attorney for Booth Fisheries Company and Zurich General Accident and Liability Insurance Company, Ltd., a corporation, Plaintiffs in Error.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 313

BOOTH FISHERIES COMPANY and ZURICH GENERAL ACCIDENT & LIABILITY COMPANY, LTD.,

Plaintiffs in Error,

vs.

INDUSTRIAL COMMISSION OF WISCONSIN and MARY McLAUGHLIN,

Defendants in Error.

BRIEF FOR DEFENDANT IN ERROR, INDUSTRIAL COMMISSION OF WISCONSIN

HERMAN L. EKERN,

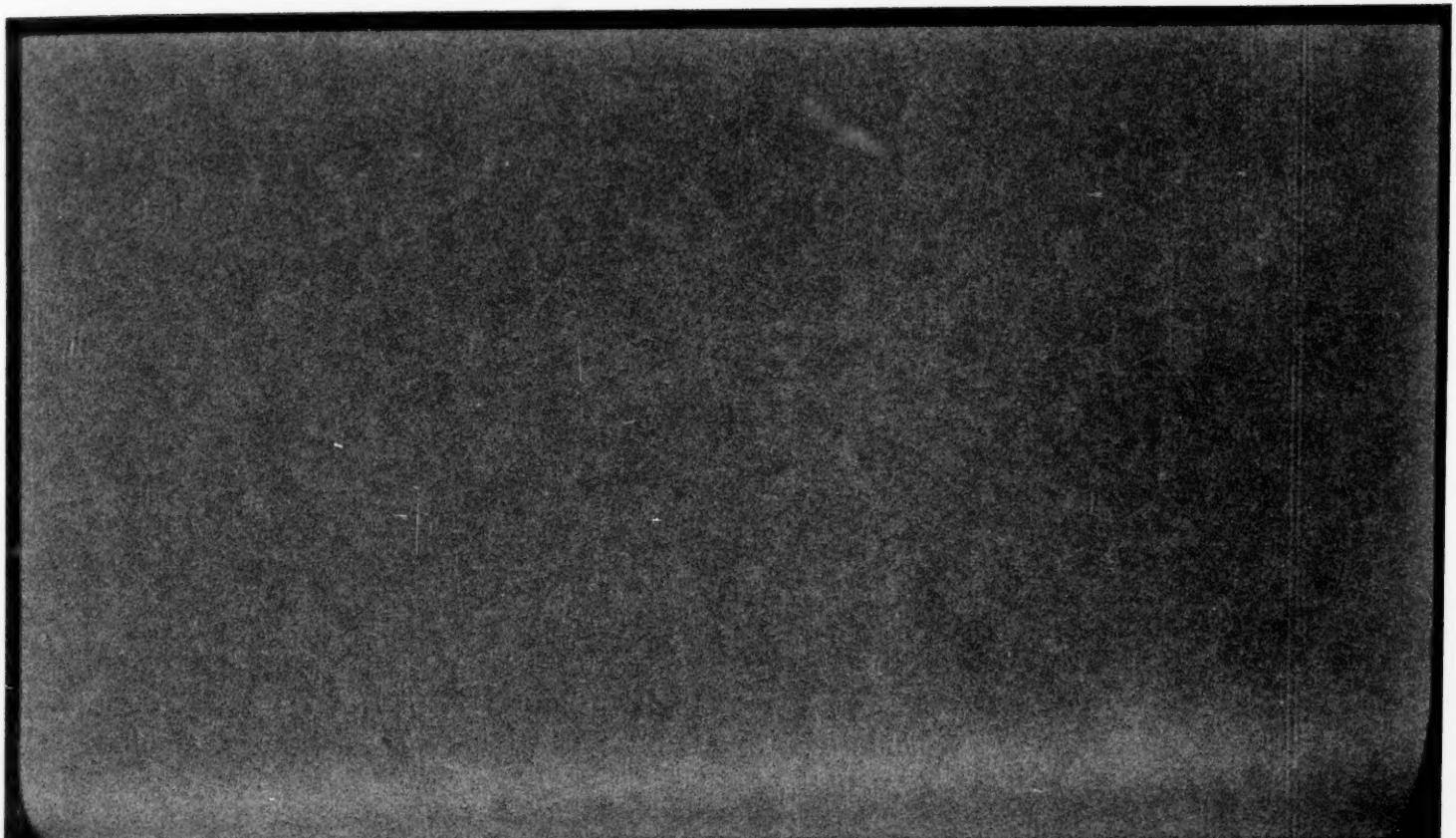
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 313

BOOTH FISHERIES COMPANY and ZURICH GENERAL ACCIDENT & LIABILITY COMPANY, LTD.,

Plaintiffs in Error.

vs.

INDUSTRIAL COMMISSION OF WISCONSIN and MARY McLAUGHLIN,

Defendants in Error.

BRIEF FOR DEFENDANT IN ERROR, INDUSTRIAL COMMISSION OF WISCONSIN

STATEMENT OF THE CASE

The opinion below is reported in 185 Wis. 127.

The action was brought, under state statutes permitting such actions, in the circuit court for Dane county, Wisconsin, for the purpose of reviewing an award of compensation, or death benefits, to the defendant in error, Mary McLaughlin, because of the death of her husband, William H. McLaughlin, by the defendant in error, Industrial Commission of Wisconsin, and against the plaintiffs in error, dated January 20, 1923, pursuant to the provisions of sections 2394-3 to 2394-32,

both inclusive, Wisconsin statutes 1921, commonly known as The Wisconsin Workmen's Compensation Law. (R. 9).

That court confirmed the award (R. 40), and from that judgment plaintiffs in error appealed to the supreme court of Wisconsin (R. 8), which, after due hearing and consideration, affirmed the judgment of the lower court (R. 41-45). A writ of error was granted (R. 3-6), and the matter is now before this Honorable Court.

The only question argued in either of the state courts, and the only one that will be presented here, as we understand it, is whether section 2394-19, Wisconsin statutes 1921, as construed by the state courts, violates the Fourteenth Amendment to the constitution of the United States. The section in question is set out at length in the record (R. 2-3) except that it is given there as section 102.23, Wisconsin statutes, whereas that number was not given to the section until its amendment by chapter 449, section 56, Laws of Wisconsin, 1923, which became effective July 31, 1923, while this action was commenced at least as early as February 10, 1923 (R. 9). It should also be noted that the section as quoted in the record (R. 2-3) incorporates certain changes made by chapter 437, Laws of Wisconsin, 1923, which became effective July 19, 1923. These changes, however, are not material to the question here at issue.

The part of that section material here provides:

> "1. The findings of fact made by the commission acting within its powers, shall * * * be conclusive. * * *."

The plaintiffs in error contend that this section is invalid because, as construed by the state courts, no judicial review of facts is permitted (R. 1-3, 6-7).

The Wisconsin Workmen's Compensation Law is Optional

Section 2394-3, Wisconsin statutes 1921, provides in part:

> "Liability for the compensation hereinafter provided for, in

lieu of any other liability whatsoever, shall exist against an employer for any personal injury accidentally sustained by his employe, and for his death, in those cases where the following conditions of compensation concur;

"(1) Where, at the time of the accident, both the employer and employe are subject to the provisions of sections 2394-3 to 2394-31, inclusive.

* * *."

Section 2394-4, Wisconsin statutes 1921, so far as material here, provides:

"The following shall constitute employers subject to the provisions of sections 2394-3 to 2394-31, inclusive, within the meaning of section 2394-3:

"(1) * * *

"(2) Every person, firm, and private corporation * * * who has any person in service, under any contract of hire, express or implied, oral or written, and who, at or prior to the time of the accident to the employe for which compensation under sections 2394-3 to 2394-31, inclusive, may be claimed, shall, in the manner provided in section 2394-5, have *elected* to become subject to the provisions of sections 2394-3 to 2394-31, inclusive, and who shall not, prior to such accident, have effected a *withdrawal* of such *election*, in the manner provided in subsection 1 of section 2394-5." (Italics ours.)

Section 2394-5, Wisconsin statutes 1921, provides:

"1. Such *election* on the part of the employer shall be made by filing with the industrial commission, a written statement to the effect that he accepts the provisions of sections 2394-3 to 2394-31, inclusive, the filing of which statement shall operate, within the meaning of section 2394-4 to subject such employer to the provisions of sections 2394-3 to 2394-31, inclusive, for the term of one year from the date of filing such statement and until the first day of July following, and thereafter, without further act on

his part, for successive terms of one year each, beginning July first of each year, unless such employer shall, at least thirty days prior to the first day of July of any year, file in the office of said commission a notice in writing to the effect that he desires to *withdraw his election* to be subject to the provisions of sections 2394-3 to 2394-31, inclusive.

"2. If any employer shall at any time after August 31, 1917, have three or more employes in a common employment he shall be *deemed to have elected* to accept the provisions of sections 2394-3 to 2394-31, inclusive, unless prior to that date such employer shall have filed with the industrial commission a notice in writing to the effect that he *elects* not to accept the provisions hereof. Provided, that any employer commencing subsequent to August 31, 1917, may make his *election* not to become subject to sections 2394-3 to 2394-31, inclusive, at any time prior to becoming an employer of three or more employes in a common employment. Such employer may withdraw from the provisions of sections 2394-3 to 2394-31, inclusive, in the manner provided in subsection 1 of section 2394-5. * * *." (Italics ours.)

Thus the employer has his choice of either becoming subject to this law, or of not becoming so subject. And he may withdraw such election on the first day of July of any year.

The supreme court of Wisconsin, in a case attacking the validity of the entire Workmen's Compensation Law, noted

"that this is not a compulsory law: no employer is compelled to pay damages to an employe without having had his day in court. * * * We are therefore relieved from all consideration of the question whether a compulsory compensation act offends against those clauses of the state and federal constitutions which guarantee all citizens against the deprivation of property without due process of law."

Borgnis v. Falk Co., 147 Wis. 327, 350.

Being an Elective, or Optional, Law, it Does Not Violate the Fourteenth Amendment.

The elective provisions of the law make it essentially one providing for arbitration. No man becomes subject to its provisions against his will, and when he sees fit to do so he may withdraw from its provisions. He is under no compulsion to either become or remain subject to it. When he elects to become subject, he chooses to be bound by the provisions for settling controversies arising under it. He is not deprived of any rights by the act. He has voluntarily chosen to give up certain rights because of certain benefits to be obtained. The Fourteenth Amendment has no application to a voluntary surrender of property or property rights by the owner thereof. It relates only to the deprivation of such rights by a sovereign power.

Agreements to arbitrate special matters, and that is what this election amounts to, are universally sustained.

Borgnis v. Falk Co., 147 Wis. 327, 361;
5 C. J. 20, *et seq.*

As was said by the supreme court of Wisconsin, this law:

"deprives no one of any rights protected by the constitution, nor does it affect them in any manner whatever unless they elect to accept its provisions, and having elected to accept its provisions they are finally estopped from challenging its constitutionality upon both reason and authority. It does not take property without due process of law. It takes property only by acquiescence and consent of the individual, as in the absence of the acceptance by the individual of the provisions of the law it affects him not at all.

"The law presents an entire scheme for compensating industrial accidents, and he who accepts the law accepts it in its entirety. Along with its benefits he takes its burdens. In order to avail himself of the rates of compensation therein provided, he submits the determination of facts with reference to all disputes between employers and employes where compensation is claimed to the Industrial Commission, and waives any further judicial review than that provided for in the act itself. Until the appellant Booth

> Fisheries Company elected to come under the provisions of this act the law meant no more to it than that of a foreign jurisdiction. If was in no manner concerned with this provision for a judicial review of the findings of the Industrial Commission. Having voluntarily submitted itself to the provisions of the act, it must take them as the legislature enacted them, and it cannot be heard to challenge any part of the law."
>
> *Booth Fisheries Co. v. Industrial Commission*, 185 Wis. 127, 133-134.

And the circuit court for Dane county said that in electing to become subject to this law the Booth Fisheries Company were

> "thereby consenting that the findings of the commission shall be final if they are supported by substantial credible evidence. In view of such consent, if the evidence is sufficient to support the findings, 'no man * * * is deprived of his right to "due process of law" thereby.' Borgnis v. Falk Co., 147 Wis. 327, 361. It is the fact that the plaintiffs would not be subject to the provisions of the workmen's compensation act which they attack if the employer had not elected to accept every provision that the plaintiffs now seek to question that relieves the court from all consideration of questions whether a compulsory act containing the provision here in question would offend 'against those clauses of the state and federal constitutions which guarantee all citizens against the deprivation of property without due process of law.' Borgnis v. Falk Co., 147 Wis. 327, 350." (R. 39.)

See also *Pierce v. Barker*, (Wis.) 205 N. W. 496. (Decided Oct. 20, 1925, and not yet officially reported.)

Construction of Section 2394-10

Section 2394-19, Wisconsin statutes 1921, does not differ materially from section 2394-19, Wisconsin statutes 1911. The supreme court of Wisconsin held that the act does not take away from the courts the power to review jurisdictional questions, and that the expression "without or in excess of its powers" in a provision section subsequent to the part in our Statement of the Case, is

"substantially the equivalent, or at least as inclusive, of the expression 'without or in excess of its jurisdiction,' as those words are used in *certiorari* actions to review the decisions of administrative officers and bodies. We know of no other construction that can be logically given to them, and it seems to us that they were designedly and advisedly inserted by the framers of the bill to meet the very objection which is now made."

Borgnis v. Falk Co., 147 Wis. 327, 360-361.

Hence the phrase "within its powers," must be the equivalent of "within its jurisdiction."

Under that provision of section 2394-19 quoted in our Statement of the Case, it is settled by the decisions of the supreme court of Wisconsin that findings of fact made by the Industrial Commission cannot be disturbed if there is any evidence to support them.

Northwestern Iron Co. v. Industrial Commission, 154 Wis. 97;

Milwaukee v. Industrial Commission, 160 Wis. 238;

Milwaukee C. & G. Co. v. Industrial Commission, 160 Wis. 247;

William Rahr Sons Co. v. Industrial Commission, 166 Wis. 28;

Booth Fisheries Co. v. Industrial Commission, 185 Wis. 127; And many others.

With this Construction, the Section is Valid.

The supreme court of Wisconsin, referring to this section and the construction it placed upon it, said:

"* * * With this construction, it is certain that the constitutional powers of the courts have not been invaded, and that no man without his consent can be brought under the law or is deprived of his right to 'due process of law' thereby."

Borgnis v. Falk Co., 147 Wis. 327, 361.

This court had before it a similar provision, and a similar construction by a state court, and held:

> "* * * This disposes of the contention that the administrative body is clothed with an arbitrary and unbridled discretion, inconsistent with a proper conception of due process of law."

Hawkins v. Bleakly, 243 U. S. 210, 216.

A similar ruling has recently been made in Illinois.

Nega v. Chicago Rys. Co., 317 Ill. 482.

The commission's decision is final only as to questions of fact. It is subject to review upon all questions of law and jurisdiction. Similar powers are frequently, and increasingly, conferred upon mere administrative boards and officers, as is pointed out in *Borgnis v. Falk Co.*, 147 Wis. 327, 358. But if the commission should decide any question of fact without evidence, or contrary to all the evidence, that would constitute jurisdictional error, justifying a review and a reversal by the court. There is no contention that such was the case here.

Borgnis v. Falk Co., 147 Wis. 327, 360.

Compulsory Laws

We do not concede that even under a compulsory law a right to a judicial review of the questions of fact is essential to due process of law. We do not believe that it is. In that connection we cite:

New York Central R. R. Co. v. White, 243 U. S. 188;

Ward & Gow v. Krinsky, 259 U. S. 503;

Nega v. Chicago Rys. Co., 317 Ill. 482.

However, that question is not before the Court, and a discussion of it at this time would serve no useful purpose.

Plaintiffs in Error are Estopped from Raising this Question

The act, in and of itself, is inoperative and harms no one. It does not deprive plaintiffs in error, nor any one else, of any constitutional rights, and does not affect them in any way. It was not until they *elected*, voluntarily, to accept its provisions that they become subject to it. By such acceptance they waived their right, if they ever had any, to a judicial review of the facts.

That a person may waive constitutional rights is well settled.

> *Booth Fisheries Co. v. Industrial Commission*, 185 Wis. 127, 132, and cases cited.

Plaintiffs in error elected to accept the provisions of this law in order that they might enjoy the benefits of the limited liability for negligence in connection with industrial accidents which it affords.

Section 2394-9, subsection (2), par. (d); subsection (3), par. (a); subsection (5), par. (m), Wisconsin statutes 1921.

Having enjoyed the privileges, benefits and immunities of this law, upon their own voluntary election, plaintiffs in error cannot escape its burdens by asserting that it is unconstitutional.

> *Daniels v. Tearney*, 102 U. S. 415;
> *Grand Rapids & I. R. Co. v. Osborn*, 193 U. S. 17;
> *U. S. v. Thomas*, 195 U. S. 418;
> *Pera v. Shorewood*, 176 Wis. 261;
> *Booth Fisheries Co. v. Industrial Commission*, 185 Wis. 127, 132-133.

One cannot assert that a statute is unconstitutional unless the alleged unconstitutional features of the law affect him to his injury.

> *Southern R. Co. v. King*, 217 U. S. 524;
> *Standard S. F. Co. v. Wright*, 225 U. S. 540;
> *Plymouth C. Co. v. Pennsylvania*, 232 U. S. 531;
> *Booth Fisheries Co. v. Industrial Commission*, 185 Wis. 127, 133.

As the alleged rights of plaintiffs in error are not taken away by the statute, but, if taken at all, by their own voluntary election to become subject to the act, they are estopped from attacking it on the ground that it is unconstitutional.

> *Booth Fisheries Co. v. Industrial Commission*, 185 Wis. 127, 133.

Authorities Relied on by Plaintiffs in Error

In the arguments in the state courts the plaintiffs in error relied principally upon *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287.

The distinction between the questions involved in that case and those involved here are pointed out in the case of *Nega v. Chicago Rys. Co.*, 317 Ill. 482, 148 N. E., 250, 252, and in the decision of the circuit court for Dane county in the present case (R. 39). In the *Ohio Valley Water Co.* case an administrative board issued an order prescribing "a complete schedule of maximum future rates" for a public utility "and was legislative in character," and the statute, as construed by the state court, did not authorize any judicial review of the questions of fact involved. The statute was not optional, and the utility had given no consent that the order should be reviewed by any other procedure than that which prevails in the ordinary civil action. Here the award of the Industrial Commission was in no sense legislative in character, and the method of review was consented to by plaintiffs in error.

They also cited and relied upon *Otis Elevator Co. v. Industrial Commission*, 302 Ill. 90, 134 N. E. 19. The law there under consideration was compulsory, but that feature was not referred to in the opinion, and apparently was not called to the court's attention. But still more important is the construction placed upon that decision by the same court in a later case, in which it said that the case in question was decided under the amendment of 1921, which provided for a review of all questions of fact, and that

> "What was there considered was the independence and freedom of judicial consideration of issues reviewed by the court in the

> exercise of its own rules of decision, and the proviso referred to was held to be void, as an attempt to prescribe a rule governing judicial action and determination; it there being said that whatever rules of decision courts may have themselves made do not give power to the legislature to lay down such rules."
>
> *Nega v. Chicago Rys. Co.*, 317 Ill. 482, 485.

And it was expressly held that the Illinois Workmen's Compensation Law of 1919 is not unconstitutional, because the court in reviewing decisions of the Industrial Commission is not authorized to review questions of fact.

> *Nega v. Chicago Rys. Co.*, 317 Ill. 482, 148 N. E. 250.

Ekern v. McGovern, 154 Wis. 157, was also cited in the state courts. That related to an attempt by the governor to remove from office a state officer appointed by him. The court said that "due process of law" involved "hearing upon reasonable notice of time, place, and charges and after the manner of fair judicial investigation." All of these are provided for in the law here under consideration and this question is not involved here.

The court in the cited case did not, even inferentially, hold that a hearing upon the facts, or a review of the facts, by a court was essential to "due process of law."

Many States have Similar Provisions

In Appendix A we refer to the workmen's compensation laws of other states which provide that the findings of fact of the administrative board charged with the administration of the law shall be final. Many of these laws have been in force for a number of years, without any attack upon this provision having been made. Workmen's compensation laws are essentially remedial, and are a long step upward in the administration of justice as applied to injuries to workmen. Wisconsin was a pioneer in legislation of this character. If this law is invalid

because of the provision here attacked, so are the compensation laws of most of the states. We cannot believe that this is the case.

Decisions Construing Similar Provisions are Numerous

Similar provisions in other states have been uniformly construed as precluding any review by the courts upon questions of fact, in almost innumerable cases. Appendix B contains a partial list of such cases. We feel it is very significant that, with the few exceptions hereinbefore referred to, this question has not been raised. Bench and bar have assumed that such provisions are not open to the objection here raised.

If this Provision is Invalid, so are Substantially all Arbitration Statutes

There are laws in all, or most all, of the states providing for arbitration of disputes. The common law recognizes the validity of arbitration in the absence of any statute. If this law is invalid because of the provision in question, then all statutes of this kind are equally invalid, and all decisions recognizing the validity of arbitration proceedings are wrong. The statement of such a proposition would seem to furnish its own refutation.

Plaintiffs in Error have not Served any Brief

At the time of writing this brief (April 14, 1926) no brief has been served upon us by plaintiffs in error. Should such a brief be served hereafter, we reserve the privilege of serving a supplemental brief.

All of which is respectfully submitted.

HERMAN L. EKERN,
Attorney General.

WINFIELD W. GILMAN,
Special Counsel,
Attorneys for Defendant in Error,
Industrial Commission of Wisconsin.

APPENDIX A

Arizona—Subd. 1, par. a, sec. 90, ch. 83, Session Laws 1925.
California—Sec. 67, (subd.) c, ch. 586, Stats. 1917.
Colorado—Sec. 4477, Comp. L. 1921.
Georgia—Sec. 3154 (ggg) 1922 Supp. Park's Ann. Code.
Idaho—Sec. 6270, Comp. Stats. 1919.
Indiana—Sec. 8020S2, Burn's Ann. St., Supp. 1921.
Iowa—Sec. 1452, Code 1924.
Kentucky—Sec. 4935, Carroll's Stats. 1922.
Maine—Sec. 34, ch. 238, L. 1919.
Massachusetts—Sec. 11, ch. 152, Gen. L. 1921.
Michigan—Part III, sec. 12, ch. 101, Comp. L. 1915 (5465).
Minnesota—Sec. 4320, Gen. Stats. 1923.
Missouri—Sec. 44, p. 397, L. 1925.
Ohio—Sec. 1465-90, Baldwin's Ohio Code Service, 1925—sec. 1465-90, p. 227, Laws 1925.
Oklahoma—Sec. 7294, Comp. Stats. 1921, Ann.; ch. 61, L. 1923.
Pennsylvania—Sec. 22051, Stats. 1920.
South Dakota—Sec. 9475, Rev. Code 1919.
Utah—Sec. 3148a, Comp. L. 1917 Ann.; ch. 63, L. 1919; ch. 67, L. 1921.
Virginia—Sec. 1887-61, Gen. Laws 1923.

APPENDIX B

Arizona

California

Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 Pac. 35;
Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 Pac. 721;
Pruitt v. Industrial Acc. Commission, 189 Cal. 459, 209 Pac. 31;
Stacey Bros. Gas Const. Co. v. Industrial Acc. Commission, 239 Pac. 1072, decided Sept. 28, 1925.

Colorado

Passini v. Industrial Commission, 60 Colo. 349, 171 Pac. 369;
Picardi v. Industrial Commission, 70 Colo. 266, 199 Pac. 420;
Zook v. Industrial Commission, 75 Colo. 41, 223 Pac. 751.

Connecticut

Appeal of Hotel Bond Co., 89 Conn. 143, 93 A. 245;
Driscoll v. Jewell Belting Co., 96 Conn. 295, 114 A. 109;
Klautka v. Stanley Works, 123 A. 839, decided March 1, 1924.

Delaware

Rudnick v. White Bros., 7 Boyce (Del.) 576, 109 A. 881;
Miller v. Diamond Ice & Coal Co., 31 Del. (1 W. W. Harrington) 140, 111 A. 745;
Shockley v. King, 1 Harr. (31 Del.) 606, 117 A. 280.

Georgia

Traveler's Ins. Co. v. Bacon, 30 Ga. A. 728, 119 S. E. 458;
Georgia Cas. Co. v. Martin, 157 Ga. 909, 122 S. E. 881;
Maryland Cas. Co. v. England, 160 Ga. 810, 129 S. E. 75;
U. S. Fid. & Guaranty Co. v. Hall, 129 S. E. 305, decided Sept. 9, 1925.

Idaho

McNeil v. Panhandle Lbr. Co., 34 Ida. 773, 203 Pac. 1068;
Taylor v. Blackwell Lbr. Co., 37 Ida. 707, 218 Pac. 356.

Illinois

Munn v. Industrial Board, 274 Ill. 70, 113 N. E. 110;
Peoria Cordage Co. v. Industrial Board, 284 Ill. 90, 119 N. E. 996;
Republican Iron & Steel Co. v. Industrial Commission, 302 Ill. 401, 134 N. E. 754.

Indiana

Interstate Iron & Steel Co. v. Szot, 64 Ind. A. 173, 115 N. E. 599;
Haskell & Barker Car Co. v. Kay, 69 Ind. A. 545, 119 N. E. 811;
Cudahy Packing Co. v. Zapiropoulos, 75 Ind. A. 599, 129 N. E. 32;
Wilkerson v. Wood, 81 Ind. A. 248, 143 N. E. 166.

Iowa

Pace v. Appanoose Co., 184 Iowa 498, 168 N. W. 916;
Kraft v. West Hotel Co., 193 Iowa 1288, 188 N. W. 870;
O'Callahan v. Dermedy, 197 Iowa 632, 196 N. W. 10;
Pappas v. North Iowa Brick & Tile Co., 206 N. W. 146, decided Dec. 15, 1925.

Kentucky

Nelson v. Kentucky River Stone & Sand Co., 182 Ky. 317, 206 S. W. 473;
Northwest Coal Co. v. Castle, 202 Ky. 505, 260 S. W. 336;
U. S. Coal & Coke Co. v. Burrell, 205 Ky. 777, 266 S. W. 638.

Maine

Simmon's Case, 117 Me. 175, 103 A. 68;
Lemelin's Case, 123 Me. 478, 124 A. 204;
Brodin's Case, 126 A. 829, decided Dec. 11, 1924;

Fogg's Case, 132 A. 129, decided Feb. 19, 1926.

Massachusetts

Pigeon v. Employers' Liability Assur. Corp., 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915 A., 737;
In re Doherty, 222 Mass. 98, 109 N. E. 887;
In re Sinclair, 248 Mass. 414, 143 N. E. 330;
In re Giovanni, 151 N. E. 91, decided March 10, 1926.

Michigan

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Shafer v. Parke, Davis & Co., 192 Mich. 577, 159 N. W. 304;
Tanner v. Aluminum Castings Co., 210 Mich. 366, 178 N. W. 69;
King v. Munising Paper Co., 224 Mich. 691, 195 N. W. 812.

Minnesota

Lading v. City of Duluth, 152 Minn. 464, 190 N. W. 981;
Schoewe v. Winona Paint & Glass Co., 155 Minn. 4, 191 N. W. 1009;
Dunnigan v. Clinton Falls Nursery Co., 155 Minn. 286, 193 N. W. 466.

New York

Plass v. Central New England Ry. Co., 221 N. Y. 472, 117 N. E. 952;
Bloomfield v. November, 223 N. Y. 265, 119 N. E. 705;
Hubbs v. Addison Electric L. & P. Co., 230 N. Y. 303, 130 N. E. 302.

Ohio

Industrial Commission v. Deuse, 14 Ohio App. 224.

Oklahoma

Wick v. Gunn, 66 Okl. 316, 169 Pac. 1087;
Mullen v. Mitchell, 81 Okl. 201, 197 Pac. 171;
Hunt v. Magnolia Petroleum Co., 99 Okl. 264, 226 Pac. 1052;

City of Kingfisher v. State Industrial Comm., 242 Pac. 217, decided Dec. 8, 1925.

Pennsylvania

Poluskiewicz v. Philadelphia & R. C. & I. Co., 257 Pa. 305, 101 A. 638;
Stahl v. Watson Coal Co., 268 Pa. 14, 112 A. 14;
Guyer v. Equitable Gas Co., 279 Pa. 5, 123 A. 590;
Gausman v. R. T. Pearson Co., 131 A. 247, decided Nov. 23, 1925.

South Dakota

Day v. Sioux Falls Fruit Co., 43 S. D. 65, 177 N. W. 816;
Shaw's Dependents v. Fred H. Harms Piano Co., 44 S. D. 346, 184 N. W. 204;
Wakefield v. Warren-Lamb Lbr. Co., 46 S. D. 510, 194 N. W. 835.

Utah

Reteuna v. Industrial Commission, 55 Utah 258, 185 Pac. 535;
Moray v. Industrial Commission, 58 Utah 404, 199 Pac. 1023;
Park City v. Industrial Commission, 63 Utah 205, 224 Pac. 655;
Denver & R. G. W. R. System v. Industrial Commission, 243 Pac. 800, decided Feb. 5, 1926.

Vermont

Packett v. Moretown Creamery Co., 91 Vt. 97, 99 A. 638.

Virginia

Vanzant v. Southern Bending Co., 129 S. E. 268, decided Sept. 17, 1925.

West Virginia

Poccardi v. Public Service Commission, 75 W. Va. 542, 84 S. E. 242, L. R. A. 1916A, 299.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 313

BOOTH FISHERIES COMPANY and ZURICH GENERAL ACCIDENT & LIABILITY COMPANY, LTD.,
Plaintiffs in Error,

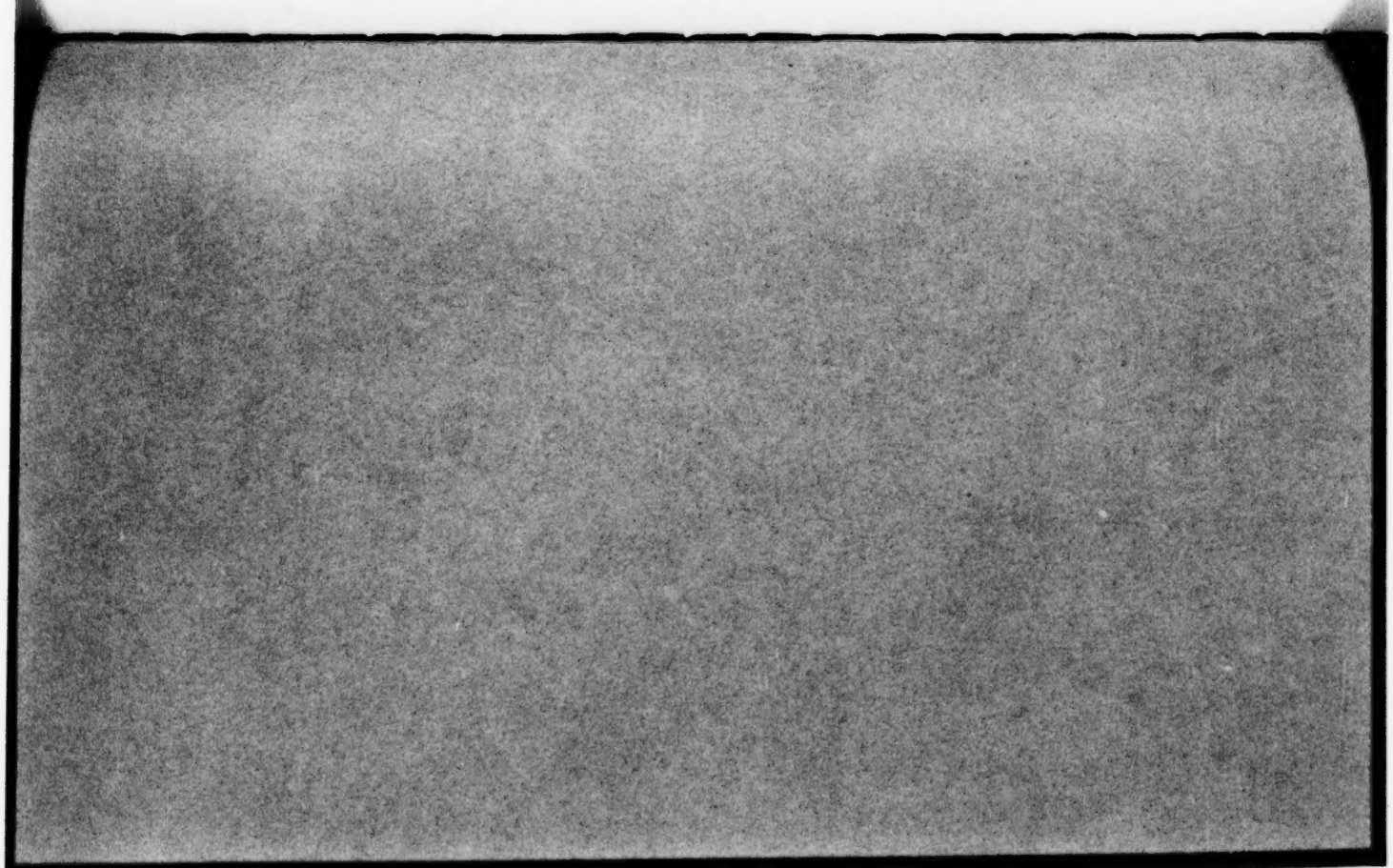
v.

INDUSTRIAL COMMISSION OF WISCONSIN and MARY McLAUGHLIN,
Defendants in Error.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR, INDUSTRIAL COMMISSION OF WISCONSIN

HERMAN L. EKERN,
Attorney General,

WINFIELD W. GILMAN,
Special Counsel,
Attorneys for Defendant in Error,
Industrial Commission of Wisconsin.



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BOOTH FISHERIES COMPANY and ZURICH GENERAL ACCIDENT & LIABILITY COMPANY, LTD.,
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v.

INDUSTRIAL COMMISSION OF WISCONSIN and MARY McLAUGHLIN,
Defendants in Error.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR, INDUSTRIAL COMMISSION OF WISCONSIN

Having now received a copy of the brief for the plaintiffs in error, we desire, very briefly, to supplement our main brief herein.

STATEMENT OF FACTS

In addition to the testimony referred to by plaintiffs in error, Constance Huen testified that he saw the deceased, William McLaughlin, the last evening he worked at the Booth Fisheries

Company plant; that he complained of being sick, and that "when I come out of that room there I have to be outside in the air." That was in room No. 1. That he found McLaughlin in the office (R. 15). On the following day McLaughlin told him he had been in No. 1 freezer, and that he fell down on his knees and he "came outside for a while and then he come in the office" (R. 17). The night before this happened McLaughlin "was just so good to me as I ever know him." He was as well as ever (R. 19).

Dr. Knox testified that he attended McLaughlin during his last illness (R. 20-21). The doctor described the condition in which he found McLaughlin (R. 21). From the history of the case and the symptoms, he figured McLaughlin had been affected with some accidental poisoning. The conditions he found were the ordinary symptoms of monoxide gas poisoning (R. 22). His diagnosis was that he was suffering from carbon monoxide poisoning (R. 24).

Albert Merrick testified that one of McLaughlin's duties was to watch the fires in the salamanders a little to see that nothing else was burning. There was a salamander in No. 1 freezer the night McLaughlin was injured and it was his duty to see that that fire was all right (R. 26).

Other evidence might be referred to also, but we see no good purpose to be served by so doing. We do not understand that there is any contention here that there was no substantial credible evidence to support the findings of the commission, but that plaintiffs in error are contending only that the court should have the power to weigh the evidence, and that in the absence of such power the statute contravenes the due process clause of the fourteenth amendment.

ARGUMENT

The Findings of the Commission Must be Supported by Evidence

Clear violations of law in reaching the result,

> "such as acting without evidence when evidence is required, or making a decision contrary to all the evidence, constitute jurisdictional error and will justify reversal of the board's action, * * *."
>
> *Borgnis v. Falk Co.*, 147 Wis. 327, 360.

It is clearly outside the powers of the commission to find essential facts that have no support in the evidence.

> *International Harvester Co. v. Industrial Commission*, 157 Wis. 167, 175;
>
> *Bekkedal Lumber Co. v. Industrial Commission*, 168 Wis. 230, 233.

Every finding of fact made by the commission "must have some *substantial* evidence in its support, though not necessarily the preponderance of the evidence." (Italics ours.)

> *Voelz v. Industrial Commission*, 161 Wis. 240, 242;
>
> *Leszala v. Jazek*, 170 Wis. 532, 536;
>
> *Widell Co. v. Industrial Commission*, 190 Wis. 179, 183.

Their findings should not be disturbed "if there is a *substantial* basis for the decision." (Italics ours.)

> *Northwestern Iron Co. v. Industrial Commission*, 154 Wis. 97, 103.

To the same effect, see:

> *William Rahr Sons Co. v. Industrial Commission*, 166 Wis. 28, 31;

Wausau Lumber Co. v. Industrial Commission, 166 Wis. 204, 206.

If there is any *substantial, credible* evidence supporting the findings, the courts cannot interfere.

Milwaukee Coke & Gas Co. v. Industrial Commission, 160 Wis. 247, 251.

Thus it appears that under the Wisconsin Workmen's Compensation Law the Wisconsin supreme court has repeatedly held that each finding of material fact must be supported, not only by evidence, but by credible evidence. It has never held, and never will hold, that a finding made without evidence in its support can stand. If such a construction were put upon the law, very clearly, we think, it would render such law unconstitutional. The construction that has been put upon it does not.

The decisions of the Industrial Commission of Wisconsin, under the construction so given, do not, and cannot, rest upon favor or discretion any more than does the finding of a jury or a judge. Human nature is not infallible. But the power to decide questions of fact must rest somewhere, and it has never been held, so far as we are aware, that such power cannot be finally vested elsewhere than in a court.

The Commission Acts Quasi-Judicially

While the Industrial Commission is an administrative body, it "is empowered to ascertain some questions of fact and apply the existing law thereto, and in so doing acts *quasi*-judicially, but it is not thereby vested with judicial power in the constitutional sense."

Borgnis v. Falk Co., 147 Wis. 327, 358.

That such boards may be authorized to act *quasi*-judicially, by ascertaining certain questions of fact, is elemental.

The Powers Exercised Are Not Like Rate-Making Powers

In *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, *Oklahoma Operating Co. v. Love*, 252 U. S. 331, and *Bluefield Co. v. Public Service Comm.*, 262 U. S. 679, the court had before it the attempted exercise of the rate-making power, clearly a legislative function. The Industrial Commission of Wisconsin does not attempt to exercise any similar power, and the law here attacked does not attempt to confer any such power upon it. The commission is limited to ascertaining and finding, upon substantial, credible evidence, the essential facts. The law itself prescribes what the compensation shall be upon those facts. If the commission makes any finding not based upon substantial, credible evidence, as we have shown, it thereby acts without or in excess of its powers, and its award "shall be set aside" under the express provisions of sec. 2394-19, Wisconsin Stats. 1921, sec. 102.23, Wisconsin Stats. 1925.

If its findings do not support the award made, the same result follows, under the provisions of that same section.

This affords as full and complete a judicial review as is required to constitute "due process of law."

All of which is respectfully submitted.

HERMAN L. EKERN,
Attorney General.

WINFIELD W. GILMAN,
Special Counsel,
Attorneys for Defendant in Error,
Industrial Commission of Wisconsin.

FILED
APR 29 1926

In The

Supreme Court of the United States

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No. 313.

BOOTH FISHERIES COMPANY, and
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v.

INDUSTRIAL COMMISSION OF THE STATE OF WISCONSIN, and
MARY McLAUGHLIN.

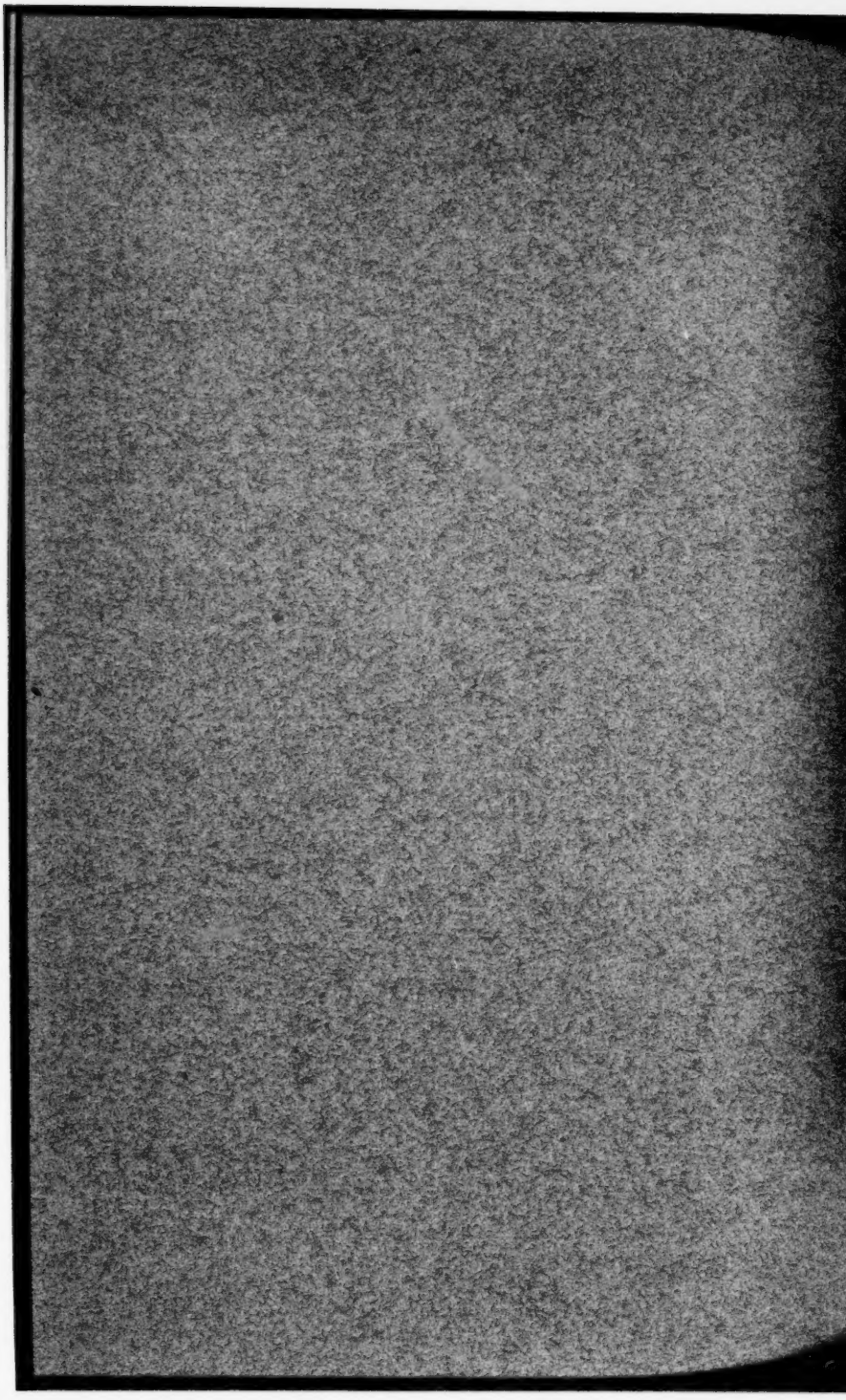
In Error to the Supreme Court of Wisconsin.
(30,949.)

BRIEF FOR DEFENDANT IN ERROR, MARY McLAUGHLIN.

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INDUSTRIAL COMMISSION OF THE STATE OF WISCONSIN, and
MARY McLAUGHLIN.

In Error to the Supreme Court of Wisconsin.
(30,949.)

BRIEF FOR DEFENDANT IN ERROR, MARY McLAUGHLIN.

STATEMENT OF CASE.

This was an action originally brought by the employer, Booth Fisheries Company, and its insurer, the Zurich Company, in circuit court for Dane county Wis-

consin (Rec., 9) to review an award of $4200.00 made by the Wisconsin Industrial Commission (Rec., 12) in favor of the defendant in error, Mary McLaughlin, and against said Booth Fisheries Company and Zurich Company under the Wisconsin Workmen's Compensation Act.

The award was based upon the accidental death of her husband, William McLaughlin, from monoxide gas poisoning while engaged in his work as night watchman for the Booth Fisheries Company at its Green Bay, Wisconsin, plant.

Inasmuch as the plaintiff in error attacks the sufficiency of the evidence to sustain the award, for the stated purpose of showing "on what kind of evidence an administrative body makes its decision in taking the property of an individual," we shall indulge in a somewhat more elaborate statement of the facts than seems really necessary.

It was shown by his foreman (Rec., 26) that McLaughlin was instructed to go into the freezer where a salamander was burning, for the purpose of seeing that it was all right. The salamander is a stove composed merely of a cast iron pipe with a coke fire in it, and without any means for carrying outside the generated gases (Rec., 28, 29). The room in which it was located, while having provision for ventilation by means of some twenty 8x4-inch openings at the top, had only two of these open on the night in question (Rec., 27).

The general superintendent, Jorgensen, after the report next morning that McLaughlin had been gassed, looked into the freezer in question (Rec., 29) and found gas there then (Rec., 30).

McLaughlin, although 77 years of age (Rec., 24), was hale and hearty, unusually sprightly, and apparently in the best of health to the day of his injury (Rec., 19, 24); had not touched liquor since 1880 (Rec., 25). He left home on the night of his injury as well as ever (Rec., 25), but was brought home by his coworker unable to speak. No one saw him enter the room containing the gas, but he was found by his coworker at about 4 a. m., lying in a chair at the office (Rec., 14) sick. He told this coworker at the time that he had been in No. 1, the cooler in question. Later he also told his wife he had been in there (C., 25) that his knees gave out as he came out and that he crawled around on his hands and knees.

While post mortem findings were testified to as claimed in the brief for plaintiff in error, Dr. E. S. Knox, who was called in to attend him at 6:00 a. m. the morning of his illness, testified that from the symptoms which he then found as well as from the history of the case, he diagnosed the case as monoxide gas poisoning (Rec., 22, 24).

Dr. Knox was familiar with such cases (Rec., 22) having specialized in gas poisoning during his overseas service during the war (Rec., 20).

Although the physician called by the insurance company on direct examination testified to findings inconsistent with monoxide poisoning, based chiefly on his post mortem, conducted with no representative of the widow present, his cross-examination entirely destroyed the effect of his testimony. Thus he had claimed that the absence of a cherry red color of the blood as shown by the post mortem two days after death negatived monoxide poisoning (Rec., 31), but admitted (Rec., 33)

that medical authorities stated only that it was generally but not always present after death (see also Rec., 37; Knox).

Again he claimed that albumen and granular casts indicated nephritis, or Bright's disease, as a cause of death (Rec., 33) and denied that they commonly accompanied monoxide poisoning. Dr. Knox later testified that they were present in all such cases (Rec., 37) as based on his war experience as well as medical authorities.

At first he hinted at death from fatty degeneration of the heart (Rec., 31), but on cross-examination admitted (Rec., 34) that that was inevitable from want of proper oxygenation in gas cases.

He attributed death to pneumonia, supported by his post mortem finding of pneumonia conditions (Rec., 34), denying that that would indicate carbon monoxide exposure. Yet he admitted that in any case an elderly man might develop pneumonia as a result of confinement to his bed for ten days (Rec., 35) independent of the original cause. McLaughlin lived 10 days after his exposure. The doctor further admitted that he couldn't say just when the pneumonia started (Rec., 35), and that he had found no evidence of it on his stethoscopic examination.

He further admitted that Billings was a recognized authority in toxicology (Rec., 34), and that at page 741 of Vol. 1, Billings stated that pneumonic changes are frequently observed in cases of monoxide poisoning.

He also admitted that he made a blood test during the life of the patient, which showed a deficiency of 30 per cent in the proportion of haemoglobin (Rec., 34)

which loss is exactly the condition due to the destruction of haemoglobin by chemical combination with monoxide gas (Rec., 31).

On this record, the commission found, as would any other intelligent trier of fact, that death resulted from the exposure to monoxide gas in the course of his employment and awarded compensation to the widow. The judgment of the circuit court for Dane county (Rec., 40) confirmed the award made by the Industrial Commission.

On appeal to the Supreme Court of Wisconsin, this judgment was affirmed (Rec., 41).

Both plaintiffs then brought this writ of error (Rec., 1) on the assignment of error (Rec., 6) that the Supreme Court of Wisconsin erred in upholding the constitutionality of the State Workmen's Compensation Act, Section 102.23, Wisconsin Statutes of 1921, because of an alleged lack of provision therein for a judicial finding of facts, claimed to constitute want of due process of law.

BRIEF.

I.

Due process of law is had by the hearings provided in the Wisconsin Compensation Act since it is appropriate to the case and just to the parties to be affected, and due notice of the hearings and an opportunity to be heard is given to all parties.

Section 2394-16; Section 2394-42; Wisconsin Statutes of 1921.

Twining v. New Jersey, 211 U. S., 78, at 110, 111.

Hagar v. Reclamation District, 111 U. S., 701.

Davidson v. New Orleans, 96 U. S., 97, 102.

Murray v. Hoboken Land Co., 18 How., 272.

Borgnis v. Falk Co., 147 Wis., 327, at 359.

Pruns v. Westine (Wis., Apr. 7, 1925), 203 N. W., 330; 204 N. W., 576.

II.

The Wisconsin Industrial Commission is a quasi judicial administrative body and in the making of findings of fact in specific compensation cases acts in such quasi judicial capacity so that findings so made are due process of law.

Wisconsin Statutes of 1921, Sections 2394-15 to Section 2394-42.

Ohio Valley Water Co. v. Ben Avonborough, 253 U. S., 287.

Prentiss v. Atlantic Coast Line Co., 211 U. S., 210.

Borgnis v. Falk Co., 147 Wis., 327.

Ekiu v. U. S., 142 U. S., 651.

U. S. v. Ah Lung, 124 U. S., 621.

Li Sung v. U. S., 180 U. S., 486.

Lem Moon Sung v. U. S., 158 U. S., 538.

Fong Yue Ting v. U. S., 149 U. S., 698.

Wong Wing v. U. S., 163 U. S., 228.

Philadelphia and Trenton R. R. v. Stimpson, 39 U. S., 448.

Bushnell v. Leland, 164 U. S., 684.

U. S. Ex Rel. v. Knox, 102 U. S., 423.

III.

The fact being that submission to the Wisconsin Compensation Act is voluntary, the individual affected cannot assert its unconstitutionality.

Borgnis v. Falk Co., 147 Wis., 327, at 350.

Carson v. Brockton, 182 U. S., 382, at 401, 402.

Hawkins v. Bleakly, 243 U. S., 210; 61 L. Ed., 678, 684.

New York C. R. Co. v. White, 243 U. S., 188.

Mountain Timber Co. v. Washington, 243 U. S., 219.

Ward & Gow v. Krinsky, 259 U. S., 503.

Middleton v. Texas Power & Light Co., 249 U. S., 152.

Arizona Copper Co. v. Hammer, 250 U. S., 400.

Madera Sugar Pine Co. v. Ind. Acc. Com. of Cal., 262 U. S., 499.

Cudahy Packing Co. v. Parramore, Sup. Ct. Rep., 153 (Jan. 15, 1925).

ARGUMENT.

I.

The Industrial Commission as constituted at the time of the initiation of this proceeding was in existence under the provisions of the *Wisconsin Statutes of 1921, Section 2394-42,* as follows:

> "There is hereby created a board which shall be known as the 'Industrial Commission of Wisconsin.' The governor, by and with the advice of the senate, shall appoint a member who shall serve two years, another who shall serve four years, and another who shall serve six years. Thereafter each member shall be appointed and confirmed for terms of six years each. Each member of the board shall take and file the official oath." * * *

By *Section 2394-15 of the Wisconsin Statutes of 1921,* it was enacted that:

(1) Any dispute or controversy concerning compensation under *Sections 2394-3 to 2394-31* inclusive, including any in which the state may be a party, shall be submitted to said industrial commission in the manner and with the effect provided in *Sections 2394-3* to *2394-31* inclusive. * * *

Section 2394-16 provided:

"(1) Upon the filing with the commission by any party in interest of any application in writing stating the general nature of any claim as to which any dispute or controversy may have arisen, it shall mail a copy of such application to all other parties in interest and the insurance carrier shall be deemed a party in interest. The commission may bring in additional parties by service of a copy of the application. The commission shall fix a time for the hearing on such application which shall not be more than forty days after the filing of such application. The commission shall cause notice of such hearing, to be given to each party interested, by service of such notice on him personally or by mailing a copy thereof to him at his last known post office address at least ten days before such hearing. Such hearing may be adjourned from time to time in the discretion of the commission, and hearings may be held at such places as the commission shall designate. Either party shall have the right to be present at any hearing, in person or by attorney, or any other agent, and to present such testimony as may be pertinent to the controversy before the commission; but the commission may, with or without notice to either party, cause testimony to be taken, or an inspection of the premises where the injury occurred to be had, or the time books and payroll of the employer to be examined by any member of the commission or any examiner appointed by it, and may from time to time direct any employee claiming compensation to be examined by a regular physician; the testimony so taken, and the results of any such inspection or examination, to be reported to the commission, for its consideration upon final hearing All *ex parte* testimony taken by the commission shall be reduced to writing and either party

shall have opportunity to rebut the same on final hearing.

(2) If the commission shall have reason to believe that the liability of any party for the payment of the compensation provided by Sections 2394-3 to 2394-31, inclusive, shall not have been discharged, it may on its own motion give notice in writing to the parties, in the manner provided for the service of an application, of a time and place when formal inquiry will be had for the purpose of determining the facts. Such notice shall contain a concise statement of the matter to be considered. Thereafter all other provisions governing proceedings an application shall attach insofar as the same may be applicable. The commission shall make findings and award as provided in Section 2394-17 and to the same effect as it might have done in proceedings upon application of a party.

(3) The commission, or any member thereof, or any examiner appointed thereby shall have power and authority to issue subpoenas, to compel the attendance of witnesses or parties, and the production of books, papers or records, and to administer oaths, hold hearings and take testimony."

(4) (Provides penalties for refusal to respond to subpoenas.)

(5) (Provides for compelling attendance and production of written evidence on order of circuit court.)

Section 2394-17 is as follows:

"After final hearing by said commission, it shall make and file (1) its findings upon all the facts involved in the controversy, and (2) its award, which shall state its determination as to the rights of the parties. Pending the final determination of any controversy before it, the com-

mission shall have power after any hearing, to make interlocutory findings, orders and awards which may be enforced in the same manner as final awards. The commission shall have the power to include in its final award, as a penalty for noncompliance with any such interlocutory order or award, if it shall find that noncompliance was not in good faith, not exceeding twenty-five per cent of each amount which shall not have been paid as directed thereby.

The commission may on its own motion, modify or change its order, findings or award at any time within twenty days from the date thereof if it shall discover any mistake therein."

Section 2394-18 is as follows:

"Either party may present a certified copy of the award to the circuit court for any county, whereupon said court shall, without notice, render a judgment in accordance therewith; which judgment, until and unless set aside as hereinafter provided shall have the same effect as though duly rendered in an action duly tried and determined by said court, and shall, with like effect, be entered and docketed."

Section 2394-19 is as follows:

1. "The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive; and the order or award, either interlocutory or final, whether judgment has been rendered thereon or not, shall be subject to review only in the manner and upon the grounds following: Within twenty days from the date of the order or award, any party aggrieved thereby may commence, in the circuit court for Dane county, an action against the commission for the review of such order or award, in which action the adverse party shall also be made defendant. In such action a complaint, which shall state the

grounds upon which a review is sought, shall be served with the summons. Service upon the secretary of the commission, or any member of the commission, shall be deemed completed service. The commission shall serve its answer within twenty days after the service of the complaint, and, within the like time, such adverse party shall, if he so desires, serve his answer to said complaint. With its answer, the commission shall make return to said court of all documents and papers on file in the matter, and of all testimony which may have been taken therein, and of its order, findings and award. Such return of the commission when filed in the office of the clerk of the circuit court shall, with the papers mentioned in Section 2898 of the statutes, constitute a judgment roll in such action; and it shall not be necessary to settle a bill of exceptions in order to make such return part of the record of such court in such action. Said action may thereupon be brought on for hearing before said court upon such record by either party to ten days' notice to the other; subject, however, to the provisions of law for a change of the place of trial or the calling in of another judge. Upon such hearing, the court may confirm or set aside such order or award; and any judgment which may theretofore have been rendered thereon; but the same shall be set aside only upon the following grounds:

(1) That the commission acted without or in excess of its powers.

(2) That the order or award was procured by fraud.

(3) That the findings of fact by the commission do not support the order or award.

2. Upon the trial of any such action the court shall disregard any irregularity or error of the commission unless it be made to affirmatively appear that the plaintiff was damaged thereby."

• • •

Brief for plaintiff in error (pages 11-12) argues that this legislation permits the sustaining of an award by the commission though unsupported by evidence or credible evidence.

In *Borgnis v. Falk Co., 147 Wis., 327,* in construing these statutes for the purpose of passing upon their constitutionality, the court said (at pages 359, 360, 361):

> "The law is made by the legislature; the facts upon which its operation is dependent are ascertained by the administrative board. While acting within the scope of its duty, or its jurisdiction, as it is sometimes called, such a board may lawfully be endowed with very broad powers, and its conclusions may be given great dignity and force, so that courts may not reverse them unless the proof be clear and satisfactory that they are wrong. * * * It is important to notice the limitation contained in the last sentence; the decision of the board may be made conclusive when the board is acting within its jurisdiction, not otherwise. Hence the question of its jurisdiction is one always open to the courts for review; it cannot itself conclusively settle that question and thus endow itself with power. If no appeal from its conclusions be provided, the question whether it has acted within its jurisdiction is always open to the examination and decision of the proper court by writ of *certiorari. In such cases it is considered that clear violations of law in reaching the result reached by the board, such as acting without evidence when evidence is required, or making a decision contrary to all the evidence, constitute jurisdictional error* and will justify reversal of the board's action, as well as the failure to take proper steps to acquire jurisdiction at the beginning of the proceeding. * * *
>
> If the act before us took away from the courts the power to consider these jurisdictional questions, either expressly or by necessary implica-

tion, the contention that judicial power had been vested in the commission, contrary to the command of the constitution, would be of greater force, but we think that the act does not do this, or attempt to do it. * * *

With this construction, it is certain that the constitutional powers of the courts have not been invaded, and that no man, without his consent can be brought under the law, or is deprived of his right to due process of law, thereby."

This construction of the law by the court of last resort of the state, conclusively answers the argument of counsel on this point.

As instances of the exercise of this power by the court, see:

Pruno v. Westine (Wis., April 7, 1925), 203 N. W., 330; 204 N. W., 576.

Lloyd-McAlpine Loggery Co. v. Whitefish (Wis., Jan. 12, 1926), 206 N. W., 914.

It is not necessary, in order to constitute due process of law that a regular proceeding be had in a court of justice or after the manner of such courts. It is only necessary that the determination made by an administrative body be upon due notice to and opportunity for hearing objections of the interested party whose property is to be taken.

Davidson v. New Orleans, 96 U. S., 97, 102.

Murray v. Hoboken Land Co., 18 How., 272.

"Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction * * * and that there shall be notice and opportunity for hearing given the parties. * * * Subject to these two fundamental conditions, which seem to be universally pre-

scribed in all systems of law established by civilized countries, this court has, up to this time, sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law." (Citing many decisions.)

Twining v. New Jersey, 211 U. S., 78, at 110, 111.

Said Mr. Justice Field, in *Hagar v. Reclamation Dist., 111 U. S., 701:*

> * * * "By 'due process,' is meant one which, following the forms of law is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adopted to the end to be attained; and *wherever it is necessary for the protection of the parties,* it must give them an opportunity to be heard respecting the justice of the judgment sought."

Courts may with reference to ascertainment of facts necessary to performance of administrative or executive acts be expressly deprived of jurisdiction to review such findings. Thus in dealing with congressional legislation touching the determination by inspection officers acting under the secretary of the treasury of facts necessary to rule upon exclusion or admission of Mongolian aliens, it has been held by this court that where the legislative body has conferred upon an executive or administrative officer or body, discretionary power * * * to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existency of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evi-

dence on which he acted. Such determination of fact is due process of law.

Ekiu v. U. S., 142 U. S., 651.
United States v. Ah Lung, 124 U. S., 621.
Li Sung v. U. S., 180 U. S., 486.
Lem Moon Sing v. U. S., 158 U. S., 538.
Fong Yue Ting v. U. S., 149 U. S., 698.
Wong Wing v. U. S., 163 U. S., 228.

See also as to findings of fact requisite to issue or reissue of a patent.

Philadelphia and Trenton R. R. Co. v. Stimpson, 39 U. S., 448.

A similar declaration has been made by this court relative to the right of a court of equity to control the action of the comptroller in levying assessments against national bank stockholders, otherwise by the statute made conclusive against such stockholders.

U. S. Ex Rel. v. Knox, 102 U. S., 423.

II.

It will be observed that the Wisconsin Compensation Act provides for a complete hearing of all questions of fact on due notice to the interested parties which affords them an opportunity to be heard before the determination of such facts. As to all matters arising under a claim to compensation under this act, the decisions of the commission relate purely to matters which have transpired and have no effect as a future regulation of conduct.

In this respect the functions of the commission differ fundamentally from those condemned by this court in the case of *Ohio Valley Water Company v. Ben Avon Borough, 253 U. S., 287,* relied upon by appellant in error.

That case followed the earlier decision in *Prentiss v. Atlantic Coast Line Co., 211 U. S., 210,* where it was held that the Virginia State Corporation Commission, though undoubtedly having judicial functions for some purposes, was acting in a legislative capacity in fixing future railroad rates and that it was therefore necessary that its functions in fixing such rates be open to judicial review to constitute due process of law.

In differentiating between the two functions the court by Mr. Justice Holmes declared (at page 226):

> "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be

applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future and therefore is an act legislative, not judicial in kind. * * *

Within this rule the commission acted in a quasi judicial capacity in determining the existence of the facts necessary to its awards in compensation cases. The entire proceeding here was according to the course of procedure applicable to a court and was clearly due process, within the definitions thereof laid down by this court.

The Industrial Commission is not a court, even within the broader definition of the term recognized by some authorities"

(15 C. J., 716.)

In *Borgnis v. Falk Co., 147 Wis., 327, at 388,* the Wisconsin court said:

"We do not consider the Industrial Commission a court, nor do we construe the act as vesting in the commission judicial powers within the meaning of the (state) constitution. It is an administrative body or arm of the government which in the course of its administration of a law is empowered to ascertain some questions of fact and apply the existing law thereto, and in so doing acts *quasi* judicially, but it is not thereby vested with judicial power in the constitutional sense."

Bushnell v. Leland, 164 U. S., 684; 17 Sup. Ct., 209.

Within the tests of due process as laid down in all of the decisions of this court, it is respectfully submitted that the proceedings before the Wisconsin Industrial Board and the provisions for judicial review thereof constitute due process of law.

III.

It would seem useless to add anything by way of argument to the very exhaustive opinions of the Supreme Court of Wisconsin covering the voluntary character of the submission by the parties in a compensation case to the operations of the law and its administration by the Industrial Commission.

> *Borgnis v. Falk Company, 147 Wis., 327, at 350.*
> *Opinion of Justice Owen, below (Rec., 44).*

As pointed out in the latter opinion, not only may a constitutional right be waived, but one may not enjoy the benefits of an act and then assert its unconstitutionality to escape its burdens.

This court has already passed on the constitutionality of similar legislation of other states and has sustained them in every instance where the element of voluntary submission thereto is present. In each case the objection of want of due process was raised although not in any instance directly questioning the want of a review of findings of fact. It will be noted that in the *Hawkins case* as well as *New York Central Ry. Co. v. White*, the opinions of the court refer to the facts that under the statutes considered there is no judicial review except of questions of law.

> *Hawkins v. Bleakly, 243 U. S., 210; 61 L. Ed., 678, 684.*
> *New York C. R. Co. v. White, 243 U. S., 188.*
> *Mountain Timber Co. v. Washington, 243 U. S., 219.*
> *Ward & Gow v. Krinsky, 259 U. S., 503.*

Middleton v. Texas Power & Light Co., 249 U. S., 152.

Arizona Copper Co. v. Hammer, 250 U. S., 400.

Madera Sugar Pine Co. v. Ind. Acc. Com. of Cal., 262 U. S., 499.

Cudahy Packing Co. v. Parramore, Sup. Ct. Rep., 153 (Jan. 15).

It is therefore respectfully submitted that the judgment of the Supreme Court of Wisconsin in this cause is right and should be affirmed.

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